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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

REGIE NATIONALE DES USINES RENAULT S.A.,
Petitioner,

—against—

LAURA ANN VERMEULEN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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February 26, 1993

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QUESTIONS PRESENTED

1. Under a "stream of commerce" theory of *in personam* jurisdiction, may a federal court exercising jurisdiction pursuant to 28 U.S.C. §§ 1330 or 1332 consider an alien defendant's aggregate contacts with the United States in determining whether sufficient "minimum contacts" exist to sustain long-arm jurisdiction, when the defendant has no actual contacts with the forum state relating to the plaintiff's claim?

2. Should the Court of Appeals' decision sustaining jurisdiction be summarily vacated for failing to apply the Foreign Sovereign Immunities Act?

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IN THE

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No.

REGIE NATIONALE DES USINES RENAULT S.A.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Regie Nationale des Usines Renault S.A. ("RNUR"),[1] respectfully prays that a writ of certiorari issue

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[1] RNUR is a French corporation, approximately 80% of whose shares are owned by the French State; the balance of RNUR's shares are owned by A.B. Volvo of Sweden. In compliance with Supreme Court Rule 29.1, a list of RNUR's subsidiaries and affiliates is set forth in Exhibit A to RNUR's Application for Extension of Time to File Petition for Writ of Certiorari filed in this Court on December 24, 1992.

In addition to RNUR and Vermeulen, Jeep Eagle Sales Corporation and Chrysler Corporation were parties to the action.

to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered on July 9, 1992, which reversed the order of the District Court for the Northern District of Georgia, entered on November 19, 1990.

OPINIONS BELOW

The order of the District Court granting RNUR's motion to dismiss for lack of personal jurisdiction is reprinted in Appendix A hereto. The order of the District Court considering and denying plaintiff's motion for reconsideration is reprinted in Appendix B hereto. The final order and judgment of the District Court are reprinted in Appendices C and D, respectively, hereto.

The opinion of the Court of Appeals reversing the District Court's order is reported at 965 F.2d 1014, as amended on October 19, 1992 at 975 F.2d 746, and reprinted as amended in Appendix E hereto.[2] The order of the Court of Appeals denying RNUR's petition for rehearing is reprinted in Appendix F hereto.

On December 28, 1992, RNUR moved the Court of Appeals to vacate its judgment because it was based on a mistake of law concerning the District Court's subject matter jurisdiction, and consequently the basis for personal jurisdiction over RNUR. As stated in RNUR's motion:

> Both the District Court and this Court predicated subject matter jurisdiction on diversity grounds, pursuant to 28 U.S.C. § 1332, and based personal

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[2] The opinions, orders and judgments below are reprinted in Appendices A through F attached hereto, and "A", "B", "C", "D", "E", "F" page references are to those Appendices.

> jurisdiction on the Georgia long-arm statute, O.C.G.A. § 9-10-91.
>
> In fact, diversity jurisdiction has never existed here because RNUR is a "foreign state" for purposes of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1604-1608, and is not a "citizen" or "subject" of a foreign state for purposes of 28 U.S.C. § 1332. Consequently, subject matter jurisdiction exists exclusively under 28 U.S.C. § 1330, which contains its own personal jurisdiction provision. [citations omitted]

In order to permit the Court of Appeals to correct its ruling before seeking review in this Court, RNUR applied for a sixty-day extension of time to file this Petition, which was granted on December 30, 1992. To date, the Court of Appeals has not decided RNUR's motion.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1992. The order of the Court of Appeals denying RNUR's petition for rehearing was entered on October 1, 1992. An order granting RNUR's application for an extension of time to file a petition for a writ of certiorari was granted on December 30, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory and constitutional provisions involved in this Petition are:

- The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1441(d) and 1602 *et seq.;*
- The Georgia long-arm statute, O.C.G.A. § 9-10-91;
- The diversity statute, 28 U.S.C. § 1332; and
- The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

These provisions are set forth in Appendix G hereto.

STATEMENT OF THE CASE

Plaintiff, a citizen of Georgia, was injured in a single vehicle accident in Georgia involving her 1982 Renault LeCar, which she purchased in 1988 from her brother while both were residents of North Carolina (E2). She filed suit in the Superior Court of Fulton County, Georgia, alleging claims of negligence and strict liability against RNUR, the vehicle's manufacturer, and Jeep Eagle Sales Corporation ("Jeep Eagle"), the successor to American Motors Corporation ("AMC"), whose wholly-owned subsidiary,

American Motors Sales Corporation ("AMSC"), was the distributor of the LeCar in the United States (E2-3).[3]

At the time the complaint was filed, RNUR was an "etablissement de caractere industriel et commercial" of the French State, and wholly-owned by the French State; currently, it is a French corporation, a majority of whose shares are owned by the French State (A2; E4). At all times, RNUR has been an "agency or instrumentality" of the French State for purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* Jeep Eagle is a Delaware corporation with its principal place of business in Michigan.[4]

Prior to RNUR's being served with process, Jeep Eagle removed this action to the United States District Court of the Northern District of Georgia pursuant to 28 U.S.C. § 1332 (E3). RNUR, after receipt of the summons and complaint, filed a notice of consent to removal and, thereafter, moved to dismiss all claims against it for lack of personal jurisdiction (E3). Prior to RNUR's motion to vacate the Court of Appeals' judgment, it was assumed by all parties that the District Court's subject matter jurisdiction was founded on 28 U.S.C. § 1332 and that personal jurisdiction over RNUR was based on the Georgia long-arm statute, O.C.G.A. § 9-10-91 (A4-6; E3, 15-19).

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[3] Plaintiff's complaint also named as a defendant Renault, U.S.A., Inc., RNUR's wholly-owned American subsidiary. Renault, U.S.A., Inc. was subsequently dismissed as a defendant by agreement of the parties (E2 at n.1).

[4] Jeep Eagle subsequently was merged into Chrysler Corporation, also a Delaware corporation with its principal place of business in Michigan (E3 at n.2).

On the basis of written submissions, the District Court granted RNUR's motion to dismiss, holding the exercise of jurisdiction over RNUR inconsistent both with Georgia's long-arm statute, O.C.G.A. § 9-10-91, and with the Due Process Clause of the Fourteenth Amendment (A7-10). In particular, the District Court found that there was "no showing that RNUR purposefully did some act with or in Georgia or that the legal injury received arises out of or results from RNUR's purposeful activity" establishing "minimum contacts" necessary for jurisdiction (A9).

On appeal, the Court of Appeals reversed, reviewing *de novo* the assertion of personal jurisdiction (E3, 15-39). Because it found the Georgia courts had interpreted the State's long-arm statute to confer jurisdiction to the limits of the Due Process Clause of the Fourteenth Amendment, the Court of Appeals determined that it need not interpret state law but "only ask whether the exercise of jurisdiction over the nonresident defendant comports with due process" (E16; citation omitted).

It is undisputed that RNUR has never maintained a physical presence in Georgia, that no alter ego relationship existed between RNUR and AMSC, and that title to the Renault vehicles that AMSC distributed through dealerships in the United States passed to AMSC in France rather than in the United States (A4, 8-9; E26-28).

Invoking Justice O'Connor's plurality opinion in *Asahi* as the touchstone of its jurisdictional analysis,[5] the Court of

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[5] In *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102 (1987), this Court addressed the "stream of commerce" theory of personal jurisdiction. Writing for a four-member plurality, (continued...)

Appeals stated that "[t]he question is not whether the contacts between AMSC and Georgia establish minimum contacts between Georgia and RNUR, but rather whether RNUR, by virtue of its relationship with AMSC, purposefully availed itself of the privilege of conducting business in Georgia such that it could reasonably anticipate being haled into court there" (E27-28).

The Court of Appeals concluded that, "[i]t is indisputable that RNUR delivered its vehicles into the 'stream of commerce' with the expectation that they would be purchased by consumers in Georgia," on the grounds that, "[t]he distribution system created by the alliance between Renault and AMC/AMSC contemplated a *nationwide* network of Renault dealerships; Renault was fully aware that several of those dealerships were in Georgia" (E28; emphasis added). The Court of Appeals further stated, "[t]he remaining question under the *Asahi* plurality's analysis is whether RNUR engaged in any additional conduct such that it could

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[5](...continued)

Justice O'Connor stated:

> The placement of a product into the stream of commerce, without more is not an act of the defendant purposely directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as sales agent in the forum State.

Id., 480 U.S. at 112.

be said to have 'purposefully availed' itself of the privilege of conducting business in Georgia" (E26).

In answering this question, however, the Court of Appeals went beyond the pronouncements of *Asahi* and considered RNUR's alleged aggregate *national* contacts as *prima facie* evidence of purposeful activity directed at the Georgia forum.

First, after acknowledging that there was "no evidence in the record that RNUR designed the LeCar specifically for the Georgia market," the Court of Appeals nevertheless found that "RNUR designed the Renault LeCar for the market in the forum State" (E29). Evidence that "RNUR designed its products for the United States generally as part of a *nationwide* marketing effort, in order to 'promote the widest distribution of Renault products,'" (quoting from the distributorship agreements) was considered "sufficient to satisfy this prong of the *Asahi* analysis" (E29; emphasis added).

Similarly, the Court of Appeals acknowledged that there was "no evidence that either RNUR or AMC directed any advertising toward Georgia" (E14). It nevertheless found that "RNUR advertised its product in the forum State" on the grounds that "LeCar was *nationally* advertised, and that such advertising, by virtue of its *national scope,* reached Georgia" (E29-30; emphasis added). Again, the Court of Appeals concluded that such *prima facie* evidence of national contacts was "sufficient to establish the necessary relationship between Georgia and RNUR" (E29-30).

Third, the Court of Appeals acknowledged that there was "no evidence as to whether or not RNUR officials visited any of the six Renault dealerships in Georgia" (E14). Nevertheless, the Court of Appeals determined that "AMSC

exercised day-to-day control over the establishment and termination of Renault dealerships in the United States" (E31); that "RNUR, in conjunction with AMSC, established channels for providing regular advice to customers in Georgia" (E31); and that RNUR "took an active role in training AMSC personnel in the repair, servicing and preparation of Renault products" (E32). Again, this determination was not based on any activities of RNUR directed at or in Georgia. Rather, the Court of Appeals based its determination on general *national* contacts such as: (1) RNUR had reserved the right to set uniform standards to apply to all dealerships in the United States, (2) "RNUR and AMSC jointly engaged in the financing of retail dealerships throughout the United States," and (3) the absence of any evidence that the six Renault dealerships in Georgia were *not* among those dealerships financed by Renault (E31-32).

Finally, the Court of Appeals determined that there was *prima facie* evidence that "RNUR created and controlled the distribution network that brought its products into the United States and Georgia" in satisfaction of the fourth prong of the *Asahi* plurality analysis (E32). Again, however, this determination was based on evidence of nationwide—and not forum-specific—contacts: in particular, allegations that "the Distributor's Agreement between RNUR and AMSC created a nationwide network for Renault products, over which Renault retained *ultimate* control through various provisions in the Agreements executed by RNUR and AMC/AMSC, and pursuant to which AMSC's decisions were subject to the review or acquiescence of RNUR" (E32). Notwithstanding the Court of Appeals' theory of ultimate national contacts, the record is devoid of any evidence of RNUR specifically exercising control over activities in the Georgia forum (E32-33).

Similarly, there is no evidence in the record that any alleged contact between RNUR and the State of Georgia—whether relating to advertising or the creation, financing or operation of Renault dealerships—had any connection with plaintiff's claims. It is undisputed that plaintiff bought her car in North Carolina from her brother, and there is no evidence that she ever employed the services of a Renault dealer in Georgia for any purpose. RNUR's purported "contacts" with the Georgia forum are completely unrelated to plaintiff's claims.

Although it appears from the face of the Court of Appeals' opinion that RNUR is a French corporation, a majority of whose shares are owned by the French State, the Court of Appeals never considered whether the District Court's subject matter jurisdiction might arise exclusively under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, and whether personal jurisdiction was accordingly controlled by 28 U.S.C. § 1330(b), subject to the limitations of the Due Process Clause of the Fifth Amendment (E4).

REASONS FOR GRANTING THE WRIT

I.
The Decision of the Court of Appeals—Holding RNUR Amenable to Jurisdiction under the Georgia Long-Arm Statute on the Basis of Alleged "National Contacts" Unrelated to Plaintiff's Claims—Is Contrary to Principles Enunciated by This Court and Raises Issues of Public and International Importance.

Under the analysis of the Court of Appeals, a foreign automobile manufacturer whose products are marketed by a distributor in the United States, is amenable to suit in any jurisdiction in the United States solely by reason of its "availment of a national market through its active and profitable association with a national distributor" (*see* E34).

This jurisdictional issue is one that will come before the courts on a recurring basis, in virtually any suit involving a product manufactured in a foreign country and distributed nationally in the United States. Because it is important to the public interest in a properly functioning global marketplace that "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field," *United States* v. *First National CityBank*, 379 U.S. 378, 404 (1965) (Harlan, J. dissenting), this Court should consider and determine the issues presented.

A.

Citing Justice O'Connor's plurality opinion in *Asahi*, the Court of Appeals applied a "'stream of commerce plus'" analysis to hold that RNUR purposely availed itself of the

Georgia forum, and thus was subject to *in personam* jurisdiction under Georgia's long-arm statute (E26-33). However, because there was no evidence in the record that RNUR had any contacts with the State of Georgia that in any way related to the plaintiff's claim, the Opinion improperly creates specific long-arm jurisdiction over RNUR based upon alleged national or nationwide contacts.

Jurisdiction based on a theory of national contacts without any evidence of actual forum-related contacts is directly contrary to the pronouncements of this Court in *Asahi,* 480 U.S. at 109, that "minimum contacts" must be based on "an action of the defendant purposely directed toward the forum state" and exceeds the limitations imposed by the Due Process Clause of the Fourteenth Amendment on the permissible scope of a state's assertion of specific long-arm jurisdiction over a non-resident defendant. *See generally id.* at 108-13; *Burger King Corp.* v. *Rudzewicz,* 471 U.S. 462, 471-78 (1985); *World-Wide Volkswagon Corp.* v. *Woodson,* 444 U.S. 286, 291-94 (1980); *International Shoe* v. *Washington,* 326 U.S. 310, 316 (1945).

B.

The Court of Appeals attached great importance to the findings that the "Distributor's Agreement between RNUR and AMSC created a nationwide network for Renault products" and that RNUR "was fully aware that 6 Renault dealerships existed in Georgia" (E32). It is fundamental, however, in an assertion of "specific" jurisdiction, that the plaintiff's cause of action must relate to or "'arise out' of a defendant's contacts with the forum." *See Helicopteros Nacionales de Colombia* v. *Hall,* 466 U.S. 408, 414 & n.9. Indeed, the focus of the jurisdictional inquiry is the

"relationship between the defendant, the forum and the litigation." *Shaffer* v. *Heitner,* 433 U.S. 186, 204 (1977). In the instant case, no such relationship exists between the litigation and the defendant's alleged contacts with the forum to sustain an assertion of specific jurisdiction.[6]

This missing link between the plaintiff's causes of action and the alleged contacts of RNUR with the Georgia forum is no mere technical defect. Limitations on state jurisdiction "are more than a guarantee of immunity for inconvenience or distant litigation. They are a consequence of territorial limitations on the power of the respective states." *Hanson* v. *Denckla,* 357 U.S. 235, 257 (1958); *see Asahi,* 480 U.S. at 109 (*citing Hanson* v. *Denckla*). Absent minimum contacts with a forum relating to the claim in suit, there is no constitutional basis for a court sitting in diversity to assert power to hale a defendant before it. *See id; see also Burger King,* 471 U.S. at 471-78; *World-Wide Volkswagen,* 444 U.S. at 291-94.

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[6] After noting the distinction between general and specific jurisdiction set forth in *Helicopteros,* 466 U.S. at 414 nn.8&9, the Court of Appeals stated in a footnote that "[w]e interpret appellant's claim that Georgia has jurisdiction over RNUR in this case as an argument based on a specific jurisdiction theory, insofar as the contacts between Georgia and RNUR relate to this litigation" (E16 at n.12).

Subsequent to RNUR's filing a petition for rehearing, the Court of Appeals amended its opinion to state, *inter alia,* that "RNUR's activities in Georgia were inextricable links in the advertising and distribution network by which [plaintiff] obtained her vehicle . . ." (E33). The Court of Appeals, however, makes no attempt to support any connection between RNUR's activities in Georgia with plaintiff's claims.

By failing to require a connection between RNUR's alleged Georgia contacts and plaintiff's claims, the Court of Appeals created a kind of quasi-"doing business" jurisdiction pursuant to which RNUR is subject to jurisdiction on all claims relating to its automobile business, even though those claims have nothing to do with its alleged activities directed at the forum. Such a hybrid jurisdiction is unknown to American law and extends the powers of the States beyond the limits imposed by the Fourteenth Amendment.

II.
The Court of Appeals Effectively Decided an Important Issue Relating to the Foreign Sovereign Immunities Act That Should Be Decided by This Court.

Although the Court of Appeals did not consider the applicability of the Foreign Sovereign Immunities Act, it is clear that 28 U.S.C. § 1330, the Act's jurisdictional provision, provides the exclusive basis for subject matter jurisdiction here. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 433-35, 435 n.3 (1989). This is so because a "foreign state" is not a "citizen" or "subject" of a foreign state for purposes of 28 U.S.C. § 1332, and Congress intended 28 U.S.C. § 1330 to be the exclusive jurisdictional provision applicable when a foreign state is named as a defendant.[7] *Id.; see* H.R. No. 1487, 94th Cong.,

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[7] Congress amended 28 U.S.C. § 1332 when it enacted the Foreign Sovereign Immunities Act to delete a previous reference to foreign states as potential defendants under that section. *See Ruggiero* v. *Compania Peruana De Vapores*, 639 F.2d 872, 874 (2d Cir. 1981) (comparing text of 28 U.S.C. § 1332 pre- and post-enactment of the Foreign Sovereign Immunities Act). (continued...)

2d Sess. 6, 12 (1976), *reprinted in* 5 U.S.C.C.A.N. 6604, 6610 (1976).

Accordingly, the sole basis for asserting personal jurisdiction over RNUR lies in 28 U.S.C. § 1330(b), which provides for personal jurisdiction over a foreign state when service of process is effected in accordance with the procedures set forth in 28 U.S.C. § 1608. The consequent worldwide sweep of § 1330(b), however, is subject to the limitations imposed by the Due Process Clause of the Fifth Amendment. *Republic of Argentina* v. *Weltover, Inc.*, 112 S. Ct. 2160, 2169 ("[a]ssuming without deciding that a foreign state is a 'person' for purposes of the Due Process Clause").

By determining that RNUR's national contacts with the United States are sufficient to render it amenable to jurisdiction in the Northern District of Georgia, the Court of Appeals effectively resolved a question expressly left open by this Court in *Asahi,* namely:

> whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.

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[7](...continued)

Section 1332 continues to contemplate foreign states as potential *plaintiffs* in diversity actions. *See* 28 U.S.C. § 1332(a)(4).

480 U.S. at 113 n.* (citations omitted; emphasis in original).[8]

This is an important question, and is even more important in the present context, which involves not just an alien defendant, but an alien defendant that is an instrumentality of a foreign state. It would serve both the interests of comity and the sound administration of the laws for this question to be answered by this Court.

III.
At a Minimum, the Court of Appeals' Decision Should Be Vacated.

If this Court determines that it does not wish to hear the foregoing issues at this time, it should nevertheless exercise its supervisory powers to vacate summarily the Court of Appeals' decision and direct the Court of Appeals to remand the question of personal jurisdiction to the District Court for resolution in accordance with the Foreign Sovereign

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[8] *See also Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria,* 647 F.2d. 300, 313-14 (2d Cir. 1981), *cert. denied,* 454 U.S. 1148 (1982) (due process requires minimum contacts with the United States, not the forum state, where jurisdiction is pursuant to the Foreign Sovereign Immunities Act); *accord Richmark Corp.* v. *Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1447, 1447 n.2 (9th Cir. 1991) *(quoting Texas Trading* and reaching only the issue of "general personal jurisdiction" and not "specific" jurisdiction); *Gregorian* v. *Izvestia,* 871 F.2d 1515, 1529-30 (9th Cir.), *cert. denied,* 493 U.S. 891 (1989); *Meadows* v. *Dominican Republic,* 817 F.2d 517, 523 (9th Cir.), *cert. denied,* 484 U.S. 976 (1987) *(quoting Texas Trading); Harris Corp.* v. *National Iranian Radio and Television,* 691 F.2d 1344, 1352-53 (11th Cir. 1982) *(citing Texas Trading).*

Immunities Act. *See* Supreme Court Rule 16.1 (providing for summary disposition).[9] The Court of Appeals' decision was plainly in error in not giving effect to the provisions of the Act, and vacating its judgment will permit the issue of personal jurisdiction to be resolved in an orderly way in accordance with applicable law, preserving this Court's

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[9] *See, e.g., City of Chicago* v. *Environmental Defense Fund*, 113 S. Ct. 486 (1992); *Hicks, Kenneth* v. *Brown Group, Inc.*, 112 S. Ct. 1255 (1992).

ability to review in the future the important federal issues involved.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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February 26, 1993

APPENDIX A

Order of the District Court
Entered November 19, 1990

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
C.A. 1:89-cv-1042-HTW

LAURA ANN VERMEULEN,

Plaintiff,

—VS.—

RENAULT, U.S.A. INC., ET AL.,

Defendants.

ORDER OF COURT

This matter is pending on a motion to dismiss filed by Regie Nationale Des Usines Renault, one of the defendants. The defendant requests oral argument on its motion to dismiss. The court has reviewed the record and submissions and determines that there is adequate information in the record for ruling on the motion to dismiss without oral argument.

BACKGROUND FACTS

Plaintiff alleges that she sustained severe physical injuries when a single vehicle accident occurred while she was driving a 1982 Renault LeCar automobile. She seeks

recovery based upon negligence in manufacture and design of the automobile and strict liability.

Regie Nationale Des Usines Renault ("RNUR") is an auto manufacturer wholly owned and controlled by the Government of the Republic of France. RNUR manufactured and assembled the 1982 LeCar which is the subject matter of this suit. The vehicle was purchased by American Motors Sales Corporation ("AMSC") in France, and then imported into the United States by AMSC.

AMSC is a wholly owned subsidiary of American Motors Corporation ("AMC").[1] In 1979, AMC and RNUR entered into a series of commercial agreements which encompassed distribution of Renault vehicles in the United States and Canada. Under the agreements, certain manufacturing and financing arrangements were made but management remained unchanged and the companies remained legally independent.

Under the agreements, RNUR also received a 46.4 percent stock interest in AMC and had four directors placed on AMC's Board of Directors until the purchase of AMC by Chrysler. Renault's directors on the AMC Board always included the Director of North American Operations for RNUR and from 1981 to 1985, the president of AMC was Jose J. Dedeurwaerder, a veteran of RNUR's French operation.

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[1] In 1988 AMSC was renamed Jeep Eagle Sales Corporation. Jeep Eagle Sales Corporation has now been succeeded by the Chrysler Corporation.

AMSC would determine how many vehicles it would purchase and order them from RNUR. AMSC would then import those vehicles into the U.S. for sale. AMSC or its parent corporation, AMC, would determine how, when, and where to advertise the availability of the Renault automobiles. RNUR played no direct role in advertising or marketing.

AMSC franchised dealerships to sell the vehicles it imported from France. At the time that the subject vehicle was being marketed in the United States, six franchise dealerships were selling Renault automobiles in Georgia.

MOTION TO DISMISS

A. Burden of Proof

The plaintiff has the burden of proof to establish jurisdiction in this court. *Morris* v. *SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988); *Brown* v. *Flowers Industries*, Inc., 688 F.2d 328, 329 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). However, at this state in the proceedings when the motion is to be decided on affidavits and other evidentiary materials without a hearing, the plaintiff need only show a *prima facie* case. *DeLong Equipment Co.* v. *Washington Mills Abrasive Co.*, 840 F.2d 843. The court is obligated to deny the motion if the plaintiff alleges sufficient facts to support a reasonable inference that the defendant can be subjected to jurisdiction of this court. *Jackam* v. *Hospital Corporation of America Mideast, Ltd.*, 800 F.2d 1577 (11th Cir. 1986).

Allegations in the complaint which are not controverted by defendants' evidence must be accepted as true. *DeLong Equipment*, 840 F.2d at 843; *Morris*, 843 F.2d at 492. Conflicts in the facts are to be resolved in the plaintiff's favor

for determining if a *prima facie* case exists. *Morris*, 843 F.2d at 492; *DeLong*, 840 F.2d at 843; *Brown*, 688 F.2d at 332.

B. Factual Showing

RNUR has produced evidence showing that it has never been a corporation organized or existing under the laws of the State of Georgia. RNUR has never been registered as a foreign corporation doing business in the State of Georgia. RNUR has no agent to accept service of process in the State of Georgia, nor does it maintain an office in Georgia. RNUR does not conduct or solicit business in the state of Georgia. It owns no real or personal property in this state and does not maintain telephones or receive mail in Georgia. Mr. Husson, the Assistant General Counsel of RNUR, has testified via affidavit that RNUR, "has never done business in the United States, nor has it ever had any offices in the United States." (Affidavit of Husson, ¶ 5).

The evidence indicates that plaintiff purchased the subject vehicle from her brother who is a resident of North Carolina where she was a resident at the time of purchase. Plaintiff produced no evidence that the specific vehicle was ever sold, marketed or distributed in Georgia. Plaintiff brought the vehicle into this state when she moved here a few weeks before the accident.

C. Legal Standard

In order to assert jurisdiction over non-resident defendants in a diversity action, requirements of the long arm statute of the forum state must be met and due process requirements of minimum contacts must be met. *Southwire Company* v. *Trans-world Metals and Company, Ltd.*, 735

F.2d 440 (11th Cir. 1984); *Gold-Kist, Inc.* v. *Baskin Robbins Ice Cream Co.*, 623 F.2d 375, 377 (5th Cir. 1980).

1. Georgia Long Arm Statute

O.C.G.A. § 9-10-91 provides the first step in the jurisdictional analysis. This statute provides that:

> A court of this state may exercise personal jurisdiction over any non-resident ... as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:
> (1) Transacts any business within this state;
> (2) commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;
> (3) commits a tortious injury in this state caused by an act or omission outside this state if the tortfeasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state; ...

O.C.G.A. § 9-10-91 (Michie Supp. 1989).

The Georgia courts have construed § 9-10-91(1) as applying only to contract claims, *Whitaker* v. *Krestmark of Alabama, Inc.*, 157 Ga. App. 536 (1981); *see also DeLong*, 840 F.2d at 848; and § 9-10-91(2) and (3) as applying to tort claims, *DeLong*, 840 F.2d at 848. The Georgia courts have construed all three sections to confer jurisdiction to the maximum extent allowable under due process. *First United*

Bank of Mississippi v. *First National Bank of Atlanta*, 255 Ga. 505 (1986); *see also DeLong*, 840 F.2d at 843, 849 n.7; *Southwire*, 735 F.2d at 442.

The Georgia courts have two separate tests for jurisdiction depending on whether the cause of action is a contract or a tort. In a tort action, the non-resident must have purposefully done some act or consummated some transaction with or in the forum (but the actual act or omission need not have occurred in the state). The defendant need not be physically within the forum when the act or transaction occurs and a single instance may suffice. The Georgia plaintiff must have a legal cause of action in tort against the nonresident, which arises out of or results from the purposeful activity of the defendant involving the state.

Finally, the exercise of jurisdiction must be reasonable. *Shellenberger* v. *Tanner*, 138 Ga. App. 399 (1976). The *Shellenberger* Court stressed that the defendant must have a contact with the forum and not just with the resident plaintiff. Moreover, the mere allegation that as a result of an act or omission by a nonresident outside the state an injury has occurred to a Georgia plaintiff does not establish a contact with the forum *in the absence of an implicit or explicit showing of activity with or in Georgia by the nonresident. Id.* at 408 (emphasis added).

2. Constitutional Due Process

The Supreme Court has repeatedly stated that the constitutional touchstone is whether the defendant purposefully established minimum contacts in the forum state. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174 (1985); *International Shoe Co.* v. *Washington*, 326

U.S. 310, 66 S. Ct. 154 (1945). It is critical in a due process analysis that the defendant's conduct in connection with the forum state is such that he should reasonably anticipate being haled into court there. *Burger King*, 471 U.S. at 474, 105 S. Ct. at 2183, quoting *World-wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567 (1980). Moreover, the unilateral activity of those claiming some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state. There must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. *Id.* at 474-75, 105 S. Ct. at 2183, quoting *Hanson* v. *Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239-40 (1958).

Once it has been decided that a defendant purposefully established minimum contacts with the forum state, the contacts must be considered in light of "reasonableness" factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice. *Burger King*, 471 U.S. at 476, 105 S. Ct. at 2184. These factors include the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Id.* at 477, 105 S. Ct. at 2134.

In response to defendant RNUR's motion, plaintiff contends that the United States represents the largest market for Renault vehicles outside of France. Plaintiff does not dispute that RNUR does not have direct marketing contacts

with Georgia or that Renault automobiles are bought in France by AMC and distributed by AMC in the United States. Instead, plaintiff contends that RNUR has always contained an ownership interest in its products in the United States. Plaintiff contends that AMC's [sic] 46.4 percent equity interest in AMC, its control of AMC through stock ownership, and its position on the board of directors and exchange of personnel constitutes sufficient grounds for an agency or "alter ego" relationship to confer jurisdiction. Plaintiff further contends that, given this control, it is reasonable for this court to infer that RNUR has purposefully availed itself of business opportunities in Georgia and that such purposeful availment constitutes sufficient grounds for RNUR to anticipate being haled into court in Georgia.

The plaintiff offers the court's opinion in *Cartwright* v. *Fokker Aircraft U.S.A.*, Inc., 713 F. Supp. 389 (N.D. Ga. 1988) in support of her position. In *Cartwright*, the Court found it appropriate to exercise jurisdiction over a Dutch corporation which manufactured aircraft because its American subsidiary had sufficient contacts with the State of Georgia.

The court finds *Cartwright* to be factually distinguishable. Unlike the situation in *Cartwright*, plaintiff produced no evidence to show that RNUR conducts advertising, either in Georgia or nationally, for its automobiles. The evidence tended to show that AMC or AMSC conducts all advertising. The plaintiff produced no evidence to show that RNUR holds title to any property in Georgia, unlike the defendant in *Cartwright* which kept certain spare parts in a warehouse in Georgia. The plaintiff produced no evidence to show that RNUR utilized a subsidiary to do or solicit business in Georgia. The evidence showed that AMC and

AMSC are not subsidiaries of RNUR; they are separate and distinct corporate entities. The fact that RNUR may own a large, but not majority, percentage of publicly held and traded stock is not sufficient to disregard the corporate entities as distinct in law. *Barnes* v. *Finnegan Enterprises*, 150 Ga. App. 430, 258 S.E.2d 55 (1979). Likewise, the fact that RNUR may have some, but not a majority of seats, on the board of directors of AMC is insufficient to support a finding of an agency or "alter ego" relationship. Thus, the facts do not support a finding of agency or alter ego relationship between AMC or AMSC or RNUR.

Upon detailed review of the record, the court finds that plaintiff has presented insufficient evidence to satisfy the *Shellenberger* test for asserting jurisdiction pursuant to O.C.G.A. § 9-10-91(2) or (3). There is no showing that RNUR purposefully did some act with or in Georgia or that the legal injury received arises out of or results from RNUR's purposeful activity. Likewise, the plaintiff has failed to make a *prima facie* showing that the exercise of jurisdiction would be reasonable. *See, e.g., DeLong Equipment*, 840 F.2d at 849; *Shellenberger*, 138 Ga. App. at 404-05. Thus, the plaintiff has not made a *prima facie* showing of sufficient minimum contacts to establish jurisdiction in this court.

CONCLUSION

Accordingly, the court determines that, based on the absence of contacts between the plaintiff and Georgia and the fact that RNUR did not purposefully establish contacts with Georgia, RNUR could not reasonably anticipate being haled into court in Georgia. Consequently, the court finds that

plaintiff has not alleged sufficient facts to support a reasonable inference that the defendant can be subjected to the jurisdiction of this court. RNUR's motion to dismiss for lack of personal jurisdiction is hereby GRANTED.

SO ORDERED, this 19th day of November, 1990.

/s/ HORACE T. WARD
UNITED STATES DISTRICT JUDGE

APPENDIX B

Order of District Court on
Plaintiff's Motion for Reconsideration
Entered January 15, 1991

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
C.A. 1:89-cv-1042-HTW

LAURA ANN VERMEULEN,

Plaintiff,

—VS.—

RENAULT, U.S.A. INC., ET AL.,

Defendants.

ORDER OF COURT

This matter is pending on a motion for reconsideration filed by plaintiff. Plaintiff seeks a reconsideration of this court's order finding that the court lacked jurisdiction over Regie Nationale Des Usines Renault ("RNUR"), one of the defendants.

The plaintiff's motion is granted. The court reconsiders its order of November 19, 1990. Although the plaintiff contends that the court has overlooked material facts, plaintiff failed to specify which facts. The court can discern no material facts which were not considered in its previous decision.

Order of District Court
on Plaintiff's Motion for Reconsideration
Entered January 15, 1991

The plaintiff also contends that the court overlooked a decision, *Oswalt* v. *Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980). The court has reviewed that decision and finds it to be uncontrolling. The court's order was an analysis of jurisdiction under the recent Supreme Court decision of *Asahi Metal Industry Co., LTD.* v. *Superior Court of California, Solano Cty.*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), although a review indicates it was not cited.

The essence of the court's decision is that plaintiff failed to show that RNUR purposefully did some act with or in Georgia or that the legal injury received arises out of or results from RNUR's purposeful activity in Georgia. This is the basic test to invoke Georgia's long arm statute under *Shellenberger* v. *Tanner*, 138 Ga. App. 399 (1976) and satisfy the constitutional constraints of reasonableness outlined in *Asahi*, *supra*. Plaintiff fails to meet that burden in regard to RNUR.

Accordingly, plaintiff's motion for reconsideration has been considered and is **DENIED**.

SO ORDERED, this 15th day of January, 1991.

/s/ HORACE T. WARD
UNITED STATES DISTRICT JUDGE

APPENDIX C

Final Order of the District Court
Entered August 1, 1991

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
C.A. 1:89-cv-1042-HTW

LAURA ANN VERMEULEN,

Plaintiff,

—v.—

RENAULT, U.S.A., INC., REGIE NATIONALE DES USINES RENAULT (RNUR) AND JEEP EAGLE SALES CORPORATION,

Defendants.

ORDER

This Court having previously granted the Motion to Dismiss of REGIE NATIONALE DES USINES RENAULT (RNUR) in its Order of November 19, 1990, and the defendant having moved for entry of final judgment in its favor, and the Court having found that there is no just reason for delay,

IT IS HEREBY ORDERED and directed that final judgment be entered in favor of REGIE NATIONALE DES USINES RENAULT (RNUR) and dismissing it from this action pursuant to Federal Rule of Civil Procedure 54(b).

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Final Order of the District Court
Entered August 1, 1991

SO ORDERED, this 31st day of July, 1991.

/s/ HORACE T. WARD, Judge

CONSENTED TO:

/s/ Dennis T. Cathey (116600)
Attorney for Plaintiff (By
M. Diane Owens, with his
express permission)

P.O. Box 689
Cornelia, GA 30531
(404) 778-2601

APPENDIX D

Final Judgment of the District Court
Entered August 2, 1991

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION
C.A. 1:89-cv-1042-HTW

LAURA ANN VERMEULEN,

Plaintiff,

—v.—

RENAULT, U.S.A., INC., REGIE NATIONALE
DES USINES RENAULT (RNUR); ET AL.,

Defendants.

JUDGMENT

The court, Honorable Horace T. Ward, United States District Judge, by order of November 19, 1990, having granted the motion to dismiss of defendant Regie Nationale Des Usines Renault (RNUR), and by consent order of July 31, 1991, having dismissed this action with prejudice as

to defendant Renault U.S.A., Inc.; and the court having directed that final judgments be entered pursuant to Federal Rules of Civil Procedure 54(b) as to the claims brought against these defendants, it is

Ordered and Adjudged that the plaintiff recover nothing of the defendant Regie Nationale Des Usines Renault (RNUR), that her complaint be, and the same hereby is, **dismissed** as to this defendant, and that this defendant recover of the plaintiff its costs of action.

It is Further Ordered and Adjudged that plaintiff's action against the defendant Renault U.S.A., Inc. be, and the same hereby is, **dismissed with prejudice** pursuant to the consent order entered into by these parties.

Dated at Atlanta, Georgia, this 2nd day of August, 1991.

LUTHER D. THOMAS, CLERK

By:/s/ JERRY W. EVANS
Deputy Clerk

APPENDIX E

Opinion of the Court of Appeals for the Eleventh Circuit as Amended October 19, 1992

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8765

LAURA ANN VERMEULEN,
Plaintiff—Appellant,

v.

RENAULT, U.S.A., INC.; REGIE NATIONALE DES USINES RENAULT; JEEP EAGLE SALES CORPORATION; REGIE NATIONALE DES USINES RENAULT AND CHRYSLER CORPORATION,
Defendants—Appellees.

July 9, 1992.

As Amended Oct. 19, 1992.

Dennis T. Cathey, Cornelia, Ga., Benjamin S. Williams, Williams & Henry, Atlanta, Ga., for plaintiff-appellant.

M. Diane Owens, Long Weinberg, Ansley & Wheeler, Atlanta, Ga., for defendants-appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

Before KRAVITCH and DUBINA, Circuit Judges, and RONEY, Senior Circuit Judge.

Opinion of the Court of Appeals for the Eleventh Circuit as Amended October 19, 1992

KRAVITCH, Circuit Judge:

Plaintiff-Appellant Vermeulen appeals the district court's order dismissing Defendant-Appellee Regie Nationale Des Usines Renault ("RNUR") from plaintiff's product liability suit for lack of personal jurisdiction under the Georgia long-arm statute. Because we do not find Georgia's exercise of personal jurisdiction over RNUR to be inconsistent either with Georgia law or with the Due Process Clause of the Fourteenth Amendment, we reverse and remand the case to the district court.

I. BACKGROUND

In January 1988, the appellant purchased a 1982 Renault LeCar from her brother. At the time of the purchase, both seller and buyer were residents of North Carolina. Appellant subsequently moved to Georgia. On February 16, 1988, she suffered an accident on State Route 316, near Lawrenceville, Georgia, sustaining a spinal injury that has left her quadriplegic.

On April 18, 1989, contending that her injuries were the result of the negligent manufacture and design of the LeCar's passenger restraint system, appellant filed suit in the Superior Court of Fulton County, Georgia, against RNUR, the French manufacturer and designer of the subject vehicle; Renault, U.S.A., RNUR's wholly owned American subsidiary;[1] and Jeep Eagle Sales Corporation, the successor to American

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[1] Renault U.S.A. was subsequently dismissed as a defendant pursuant to a stipulation between the parties. R3-45.

Motors Corporation ("AMC"). AMC's wholly-owned subsidiary, American Motors Sales Corporation ("AMSC"), was the distributor of LeCar in the United States.[2] Defendants removed the case on diversity grounds to Federal District Court (N.D. Ga.), and RNUR moved to dismiss the case against it for lack of personal jurisdiction.

In an order dated November 19, 1990, the district court granted RNUR's motion to dismiss without conducting an evidentiary hearing on the issue, *Vermeulen* v. *Renault U.S.A., Inc., et al.*, No. 1:89-cv-1042-HTW (N.D. Ga. November 19, 1990) (hereinafter "November 19 Order"), holding that Georgia's exercise of jurisdiction over RNUR was inconsistent both with the Georgia long-arm statute, O.C.G.A. § 9-10-91, and with the Due Process Clause of the Fourteenth Amendment. The district court denied plaintiff's motion for reconsideration on January 15, 1991, stating that its dismissal of RNUR from plaintiff's suit was based on the Supreme Court's decision in *Asahi Metal Industry Co., Ltd.* v. *Superior Court of California, Solano County*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987). Plaintiff appeals the district court's order of dismissal.

II. STANDARD OF REVIEW

[1-5] We review the district court's dismissal for lack of *in personam* jurisdiction *de novo*. *Olivier* v. *Merritt Dredging Co., Inc.*, 954 F.2d 1553, 1555 (11th Cir. 1992);

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[2] Plaintiff subsequently amended her complaint to reflect the purchase of Jeep Eagle Sales Corporation by Chrysler Corporation. R1-16.

Madara v. *Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). Where, as here, the district court did not hold an evidentiary hearing on the jurisdictional issue, a plaintiff need only make out a *prima facie* case of jurisdiction over the non-resident defendant. *Delong Equipment Co.* v. *Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir. 1988); *Morris* v. *SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988). A *prima facie* case is established if the plaintiff presents sufficient evidence to defeat a motion for directed verdict. *Morris*, 843 F.2d at 492. In the absence of an evidentiary hearing, the district court considering the motion to dismiss must take as true the allegations in the complaint, to the extent they are uncontradicted by the defendant's affidavits or deposition testimony. *Id.* Further, where the evidence presented by the parties' affidavits and deposition testimony conflicts, the court must construe all reasonable inferences in favor of the plaintiff. *Id.*

III. FACTS RELATING TO JURISDICTION

RNUR, the manufacturer and designer of appellant's 1982 LeCar, is a French corporation, wholly owned by the French government. It is undisputed that RNUR (1) has never been a corporation organized or existing under the laws of the State of Georgia; (2) has never been registered as a foreign corporation doing business in Georgia; (3) has never appointed any agent to act for it or to accept service of process in Georgia; (4) has never owned real estate or personal property located in Georgia; (5) has never maintained a telephone number or mailing address in Georgia; (6) has never maintained a bank account in Georgia;

and (7) has never had an office or place of business in Georgia. R1-23-Ex. 1., pp.2-3.

A. The Agreements Between RNUR and AMC/AMSC

In 1979, RNUR entered into a series of commercial agreements with AMC and its wholly owned subsidiary, AMSC, pursuant to which AMSC agreed to act as the exclusive marketer and distributor of Renault automobiles in the United States.[3] It is undisputed that AMSC distributed the 1982 Renault LeCar at issue in this case under this distribution arrangement. The stated goals of the agreements between Renault and AMC/AMSC were, *inter alia*, "to promote the widest distribution of Renault products," and to "develop a dealer network for Renault products in the [United States]." R3-34-Ex. A, p. 1. Accordingly, AMSC agreed to purchase Renault vehicles, including LeCars, in France from RNUR, and to import them for resale in the United States.

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[3] The agreements executed between Renault and AMC/AMSC included: a "Distributor Agreement," R3-34-Ex. A; a "Built-Up Sales Agreement," R3-34-Ex. B; and a "Master Agreement," R3-34-Ex. E. These agreements contemplated several different commercial arrangements between the parties, including the manufacture of Renault cars at AMC's American plants and Renault's European distribution of AMC vehicles. Thus, the distribution arrangement between AMSC and Renault regarding the United States market was only one aspect of a wide-ranging alliance created by the parties through these agreements.

Although the distribution agreement indicated that AMSC would take full responsibility for marketing and distributing Renault vehicles in the United States, *id.* at 4, the parties contemplated that Renault would be fully involved in decisions affecting the sales of its product. AMSC covenanted to "use its best efforts to carry out the Market Representation Plan." *Id.* at 6. This plan, not itself part of the record but referenced and defined in the Distributor's Agreement, was a "mutually agreed upon plan, initialled on behalf of the parties [to the Distributor Agreement], for the franchising of Dealers to sell Renault products within the [United States]." *Id.* at 3.

The Distributor's Agreement also provided that "Renault may from time to time advise [AMSC] of suggested retail prices for Renault vehicles." *Id.* at 6. Further, the Built-Up Sales Agreement indicated that "[t]he estimated quantities of Renault Products to be purchased and sold hereunder during any Contract Year shall be mutually agreed." R3-34-Ex. B, p. 2.[4]

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[4] RNUR contends that AMSC had sole responsibility for determining the quantity and type of vehicles to be purchased from RNUR. Appellee's Brief at 22. As noted *supra*, however, where the district court has not conducted an evidentiary hearing, and the evidence presented by the parties' affidavits and deposition testimony conflicts, the court must construe all reasonable inferences in favor of the plaintiff. *Delong*, *supra*; *Morris*, *supra*. Therefore, we accept as true plaintiff's allegation that RNUR was fully involved in determining the quantity of cars to be purchased by AMSC from Renault.

Although the Distributor Agreement provided that AMSC would take responsibility for maintaining "a sufficient number of trained and competent personnel" and for instructing such personnel concerning the preparation, servicing and repair of Renault products, it also stated that RNUR would "use its best efforts to provide [AMSC] with suitable assistance in connection with [such] training and instruction responsibilities." R3-34-Ex. A, pp. 7-8.

Article VII of the Distributor Agreement contemplated that AMSC would maintain responsibility for "determining assortments, minimum quantities, geographical distribution and other matters relating to" parts and accessories offered for sale by Renault pursuant to the Sales Agreements entered into by the parties. The Distributor's Agreement provided, however, that AMSC would "discuss such matters with Renault and give serious consideration to Renault's recommendations." *Id.* at 8.

Article IX of the Agreement stated that AMSC "shall print such business forms, bearing Renault trademarks and Renault trade names, for exclusive use in its 'Renault' business as Renault and [AMSC] shall mutually agree", and that AMSC would "cause each Dealer . . . to maintain such portions of its facilities as are dedicated to product identification and signage in conformity with Renault standards and as mutually agreed." *Id.* at 10.

Under Article X of the Agreement, Renault retained the full and exclusive right to and ownership of the "Renault" trademark. The Agreement provided that [a]ny particular use of any [Renault] trademark which, in the sole judgment of Renault, is inconsistent with the image or goodwill of Renault or its business, advertising or public relations policies, will

be discontinued immediately after the same comes to the attention of Renault if Renault so notifies [AMSC]." *Id.* at 11.

Although Article XI of the Agreement provided that AMSC would retain full and exclusive responsibility for advertising, promoting and merchandising Renault products, AMSC covenanted to "work closely with Renault in the planning and developing of themes and strategy and the related budget"; to "build upon the Renault name and image as the manufacturer and designer of outstanding small cars"; and to "verify the technical content of any representation concerning Renault Products." *Id.* at 12. Article XI continued:

> [AMSC] shall not publish or permit to be published any advertising material relating to Renault Products which is likely to mislead or deceive the public or to impair the image or good will of Renault or the reputation of Renault Products. If Renault notifies [AMSC] that any advertising is injurious to Renault's business, or is likely to mislead or deceive the public, or is at variance with the business, advertising or public relations policies of Renault, or is likely to impair the image or good will of Renault, [AMSC] agrees to discontinue immediately any such advertising.

Id. at 13.

In Article XII, AMSC agreed to appoint AMC/Renault dealers in accordance with the Market Representation Plan, discussed *supra* at 6, and undertook to "use its best efforts to assure that Dealers will comply with all sales and service manuals that Renault may from time to time issue relating to

the sale and servicing of Renault Products and other matters covered by this Agreement or the Dealer Franchises." *Id.* at 14. Article XII also stated that "[A]ny dealership or dealerships operated by [AMSC] for the sale of Renault Products at retail shall at all times satisfy the standards for Renault dealerships prescribed by this Agreement, the Dealer Franchises and the sales and service manuals that Renault may issue from time to time relating to Dealers." *Id.* AMSC was responsible for the actual appointment, training and termination of such dealers. *Id.* at 13.[5]

Under Article XIII, Renault warranted its products to AMSC. *Id.* at 14. Although AMSC warranted the product to the ultimate consumer, Renault covenanted to reimburse AMSC "for warranty work performed by [AMSC] itself or by Dealers within [the United States] with respect to Renault vehicles sold therein." *Id.* at 15. Article XIII also provided that RNUR would hold harmless and indemnify AMSC against any judgment resulting from lawsuits commenced against AMSC seeking damages for alleged design or other defects in Renault products, and permitted Renault to take over the defense of any such lawsuit if Renault so chose. *Id.* at 17-18.

Article XV of the Agreement required AMSC to provide RNUR on a regular basis with certain reports and records pertaining to the distribution of Renault products. AMSC was

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[5] The "Dealer Franchises," as defined in the Distributor Agreement, were "Renault Dealer Franchise Agreement[s]" drafted by the parties, a sample of which was attached to the Distributor Agreement as Annex A-1.

required to provide Renault with (1) a monthly written analysis of its inventories of Renault products; (2) thrice-monthly reports of the then-current dealer stocks of Renault vehicles and the sales of Renault vehicles during the preceding 10-day period; (3) a quarterly report of all Dealer Franchise Agreements entered into during the preceding quarter, a list of all terminations of dealers during that quarter, and an opinion report assessing the impact of such new franchises and terminations on the Market Representation Plan. *Id.* at 28. AMSC also agreed to "furnish to Renault such written reports of compliance with the Market Representation Plan, and such marketing and customer satisfaction reports, as Renault may from time to time reasonably request." *Id.* at 29.

Finally, Article XVI of the Agreement stated explicitly that "[t]his Agreement does not constitute [AMSC] the agent or legal representative of Renault for any purpose whatsoever." *Id.* at 29.

The Master Agreement between Renault and AMC, R3-34-Ex. E, also contained certain provisions relevant to the new distribution arrangements between RNUR and AMC/AMSC. Prior to 1979, Renault U.S.A., RNUR's wholly-owned American subsidiary, had acted as RNUR's distributor in the United States. Under Section 4(c) of the Master Agreement, Renault agreed to cause Renault U.S.A. to transfer all its capital stock in several of the latter's distribution subsidiaries to AMC, and to cause Renault U.S.A. to sell to AMC certain inventories held by those subsidiaries or by Renault U.S.A. itself. R3-34-Ex. E,

pp. 10-11.[6] The Master Agreement also provided that "AMC will cause [AMSC] to fulfill all the obligations and responsibilities of Renault's distribution subsidiaries as distributors under the terms of the Renault dealer franchises in effect at the respective times of the transfer . . . . In accordance with its franchising procedures, [AMSC] will also offer to reenfranchise . . . dealers who are parties to a franchise with any such subsidiary at such times of transfer, provided such dealers are desirous of the same." *Id.* at 12-13. Finally, Section 4(c) provided that "AMC will offer employment on its customary terms to those officers and employees of Renault U.S.A. heretofore agreed upon by Renault U.S.A. and AMC." *Id.* at 13.

Section 4(e) of the Agreement created a "Policy Committee" consisting of equal numbers of "senior executives" from each company. This committee was charged with the responsibility "for reviewing the matters contemplated by this Agreement, and for recommending solutions to policy conflicts that may arise between them in connection therewith." *Id.* at 15. Section 4(e) also stated that "no decision shall be taken by either party with respect to the image or product positioning of the products of either party except by mutual agreement." *Id.*

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[6] Renault U.S.A. continues to exist today, but does not play a role in the distribution of Renault products in the United States. Renault U.S.A. played no role in the distribution of the 1982 Renault LeCar at issue in this case.

B. Implementation of the Agreements Between RNUR and AMC/AMSC

Implementation of the new alliance between RNUR and AMC/AMSC took many forms. First, through a number of financial agreements, RNUR invested significant amounts of capital into AMC. Between the years 1979 and 1984, RNUR committed $545,100,000.00 to AMC through various stock, warrant and debenture purchases. R2-27-Ex. 6, p. 28.[7] Under these agreements, Renault gained the right to "place certain limitations on the future incurrence by [AMC] of secured indebtedness for borrowed money and [limit] the use of proceeds of the sales pursuant to the agreement." R2-27-Ex. 3, p. 29. As a result of this financial commitment, AMC was able to negotiate a new five-year bank credit agreement for an additional $250 million. R2-27-Ex. 3, p. 5. Ultimately, Renault came to own 46.4% of AMC's capital stock, and to hold options on AMC stock that could make RNUR the majority stockholder in AMC. R2-27-Ex. 2, p. 2. RNUR's investments in AMC were crucial to the latter's health and future prospects during the economically unstable early 1980's. R2-27-Ex. 2, p. 1; -Ex. 3, p. 2.

Second, AMC and RNUR agreed to the "expansion of domestic wholesale financing available to the Company's AMC, Jeep and Renault dealers, the financing of fleet sales and the making of capital loans to dealers to whom wholesale financing is also provided," with an eye toward "establishing

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[7] For a complete chronology and discussion of these financial transactions, see R2-27-Ex. 2, p. 28; -Ex. 3, pp. 4-5, 29; -Ex. 4, pp. 21-22; -Ex. 5, pp. 22-23; and -Ex. 6, p. 26-27.

a full-service financial company, to support AMC, Jeep and Renault sales in the U.S. and Canada." R2-27-Ex. 2, p. 18. This financial company, dubbed American Motors Financial Corp. ("AMFC"), was ultimately formed pursuant to a joint venture between AMC and Renault Credit Internationale S.A. ("RCI"), a wholly-owned subsidiary of RNUR. RCI held a 50% interest in AMFC, which operations were later expanded to include retail financing as well as dealership financing. R3-34-Ex. C, pp. 2-3; -Ex. D, pp. 6-7.

Third, RNUR also reimbursed AMC for launch costs, marketing and other operating programs in the amounts of more than $6 million in 1980, more than $22 million in 1981, more than $91 million in 1982, and more than $28 million in 1983. R2-27-Ex. 4, p. 21; -Ex. 5, p. 26.

Throughout this time period, RNUR maintained several seats on the AMC Board of Directors, although not on the AMSC Board. *See, e.g.*, R2-27-Ex. 2, p. 47; -Ex. 3, p. 40; and -Ex. 4, p. 30. Further, Renault U.S.A. or RNUR would send its executives to work in key positions in AMC or AMSC. Deposition of Richard Willman, at p. 15. Renault U.S.A. leased these employees to AMC, but retained them on its own account. *Id.* at 18.[8]

The actual process of sale and resale of Renault vehicles in the United States took the following course: as noted *supra*, AMSC purchased the Renault vehicles in France and

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[8] During this time, several members of AMC's management team, including Jose Dedeurwaerder, AMC's President from 1982-1984 and CEO in 1985 and 1986, were former employees of Renault. *See, e.g.*, R2-27-Ex. 3, p. 2; -Ex. 7, p. 3.

exported them to the United States; the decision as to where in the United States to send the Renault vehicles rested with AMSC. R1-23-Ex. A. Renault officials met several times yearly, and engaged in frequent conversations by phone, with representatives from AMC/AMSC regarding the production, distribution and promotion of Renault vehicles. Deposition of Richard Everett, pp. 16, 20. During these meetings, the participants from both companies exchanged ideas regarding volume forecasts, monthly projections for orders, changes in vehicle specifications and marketing strategies. *Id.* at 21, 24. This exchange of ideas resulted in modifications of Renault vehicles designed to accommodate the American market. *Id.* at 45-47. RNUR built those vehicles bound for the United States in conformance with the federal regulations governing automobile production in this country. *Id.* at 17. RNUR was aware of the number of Renault dealerships in the United States; RNUR officials from time to time toured these dealerships. *Id.* at 35. There is no evidence as to whether or not RNUR officials visited any of the six Renault dealerships in Georgia. There is also no evidence that either RNUR or AMC directed any advertising specifically toward Georgia.

C. Results of the Distribution Arrangement Between RNUR and AMC

As of December 1980, there were 1302 Renault franchised dealers in the United States, six of which, as mentioned *supra*, were located in Georgia. R2-27-Ex. 2, p. 3.[9] These six dealerships, as well as all other Renault

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[9] Renault dealerships existed in 49 out of 50 states. Everett Depo., Ex. 1.

dealerships in the world, were listed as part of the "Renault Network" in a pamphlet found in the glove compartment of plaintiff's LeCar. This pamphlet, dated March 1981 and bearing the Renault trademark, stated that Renault's "16,800 Branches, Distributors and Dealers throughout the world are just like helpful neighbors, being qualified and equipped to offer the motorist all the services he requires for driving with peace of mind." Everett Depo., Ex. 1.[10]

RNUR profited immensely from its alliance with AMC/AMSC. In 1980, RNUR led all auto manufacturers in import sales improvement with a 34% increase over 1979 volume. R2-27-Ex. 2, p. 3. RNUR led in the same category in 1981, increasing its import sales 22% over 1980 volume. R2-27-Ex. 3, p. 2. Renault sold more than 37,000 vehicles to AMSC in both 1980 and 1981, more than 50,000 vehicles in 1982, and more than 40,000 vehicles in 1983, earning over $1.3 billion dollars as a result of purchases of Renault cars, components and service parts during that four-year period. R2-27-Ex. 4, p. 21; -Ex. 5, p. 26. Sales of LeCars comprised a large percentage of these import sales. *See e.g.*, R2-27-Ex. 3, p. 8. In 1984, the United States was the largest market for Renault sales outside of France. R2-27-Ex. 6, p. 14.

IV. ANALYSIS

[6,7] In a diversity action, a federal court may assert

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[10] It is unclear whether AMSC, RNUR or any other entity was responsible for the creation of this pamphlet and its placement in the glove compartment of plaintiff's LeCar.

jurisdiction over a nonresident defendant only to the extent permitted by the long-arm statute of the forum State, and only if the exercise of jurisdiction comports with the requirements of the Due Process Clause of the Fourteenth Amendment. *Morris*, 843 F.2d at 492 n.3; *Gold Kist, Inc.* v. *Baskin-Robbins Ice Cream*, 623 F.2d 375, 377 (5th Cir. 1980).[11] When the courts of the forum State have interpreted the forum's long-arm statute to confer jurisdiction to the limits allowed by federal due process, state law need not be applied: we need only ask whether the exercise of jurisdiction over the nonresident defendant comports with due process. *Olivier*, 954 F.2d at 1557.[12]

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[11] The Eleventh Circuit, in the en banc decision *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[12] In *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414-417 nn. 8 & 9, 104 S.Ct. 1868, 1872-72 nn. 8 & 9, 80 L.Ed.2d 404 (1984), the Supreme Court noted that there are two types of personal jurisdiction: general jurisdiction, which arises from a party's frequent contacts with the forum state unrelated to the litigation, and specific jurisdiction, which arises from contacts between the defendant and the forum that relate to the litigation. We interpret appellant's claim that Georgia has jurisdiction over RNUR in this case as an argument based on a specific jurisdiction theory, insofar as the contacts between Georgia and RNUR relate to this litigation. *See Bearry* v. *Beech Aircraft Corp.*, 818 F.2d 370, 374 (5th Cir. 1987) (holding that specific jurisdiction rests on the state's "direct interest in the cause of action," which is heightened if

(continued...)

A. The Georgia Long-Arm Statute[13]

Both the Georgia courts and federal courts applying Georgia law have construed the Georgia long-arm statute, O.C.G.A. § 9-10-91, to confer jurisdiction to the maximum extent allowable under due process. *First United Bank of Mississippi* v. *First National Bank of Atlanta*, 255 Ga. 505, 340 S.E.2d 597, 599 (1986); *Coe & Payne Co.* v. *Weed-*

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[12](...continued)

the harm occurs in the forum and if the plaintiff is a resident of the forum).

[13] O.G.C.A. § 9-10-91 provides, in part:

> A court of this state may exercise personal jurisdiction over any non-resident . . . as to a cause of action arising from any of the acts, omissions, ownership, use or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he: (1) Transacts any business within this state; (2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act; [or] (3) commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state. . ..

The parties in this case agree that § 9-10-91(3) is the statutory provision relevant to the question of whether Georgia possesses jurisdiction over RNUR in this case.

Mosaic Corp., 230 Ga. 58, 195 S.E.2d 399 (1973); *Complete Concepts, Ltd.* v. *General Handbag Corp.*, 880 F.2d 382, 388 (11th Cir. 1989); *Bond* v. *Octagon Process, Inc.*, 745 F. Supp. 710, 712 (M.D. Ga. 1990), *aff'd*, 926 F.2d 1573 (11th Cir. 1991), *cert. denied*, — U.S. —, 111 S.Ct. 2855, 115 L.Ed.2d 1023 (1991). The district court in this case acknowledged this construction of Georgia law. *See* November 19 Order at 6. Thus, we need only inquire as to whether Georgia's exercise of jurisdiction over RNUR in this case satisfies the due process requirements imposed by the Fourteenth Amendment.[14]

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[14] Appellees in this case, and courts in other cases, have maintained that the decision of the Georgia Supreme Court in *Gust v. Flint*, 257 Ga. 129, 356 S.E.2d 513 (1987), represents a retreat from the expansive construction given the Georgia long-arm statute by Georgia and federal courts. Although recognizing that the *Flint* decision has not overruled explicitly the prior line of cases reading the Georgia long-arm statute broadly, several courts have indicated that "*Flint* heralds a renewed emphasis on the literal language of the Georgia long-arm statute." *Cartwright v. Fokker Aircraft U.S.A., Inc.*, 713 F. Supp. 389, 392 (N.D.Ga. 1988). *See also James Whiten Livestock, Inc. v. Western Iowa Farms*, 750 F. Supp. 529, 532-33 (N.D.Ga. 1990), *aff'd without op.*, 948 F.2d 731 (11th Cir. 1991). Indeed, the district court in this case, while acknowledging the expansive interpretation of the long-arm statute, proceeded to examine independently whether it could exercise jurisdiction over RNUR under (1) Georgia law and (2) the Due Process Clause of the Fourteenth Amendment.

(continued...)

B. Due Process

[8, 9] A defendant is amenable to a forum's specific jurisdiction if (1) it possesses sufficient minimum contacts with the forum State to satisfy due process requirements, and (2) the forum's exercise of jurisdiction comports with

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[14](...continued)

> Because the Georgia Supreme Court has not overruled its longstanding precedents regarding the broad scope of the Georgia long-arm statute, we do not believe that recourse to the literal language of that statute is necessary or appropriate in this case. As the Georgia Court of Appeals stated in *Gust* after the case had been remanded from the Georgia Supreme Court:
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> > In *Coe & Payne v. Weed-Mosaic Corp.*, [supra], the [Georgia] Supreme Court had expressed the view that our long-arm statute authorized the exercise of jurisdiction over nonresident defendants "to the maximum extent permitted by procedural due process." In its decision in the present case, the Supreme [C]ourt would appear to have abandoned that view and to have adopted the position that our long-arm statute is not susceptible to such an interpretation. However, since *Coe & Payne* was not overruled, clarification of the Supreme Court's position on this important issue will have to await a future litigation.
>
> *Flint* v. *Gust*, 184 Ga.App. 242, 361 S.E.2d 722, 723 (1987). Until such clarification is forthcoming, we are bound to construe the Georgia long-arm statute to the limits of due process, to bypass the literal language of the state law and to proceed directly to the due process analysis.

"'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L.Ed. 95 (1945) (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940)); *Morris*, 843 F.2d at 492. This two-part test embodies the controlling due process principle that a defendant must have "fair warning" that a particular activity may subject it to the jurisdiction of a foreign sovereign. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472, 105 S.Ct. 2174, 2182, 85 L.Ed.2d 528 (1985); *Madara* v. *Hall*, 916 F.2d 1510, 1516 (11th Cir. 1990).

i. Minimum Contacts

[10] To trigger specific jurisdiction, the defendant's minimum contacts must satisfy three criteria. First, the contacts must be related to the plaintiff's cause of action or have given rise to it. *Burger King*, 471 U.S. at 472, 105 S.Ct. at 2182; *Madara*, 916 F.2d at 1516. Second, the contacts must involve "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson* v. *Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1958). *See also Burger King*, 471 U.S. at 474-75, 105 S.Ct. at 2183-84. Third, the defendant's contacts with the forum State must be "such that [the defendant] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). A threshold issue in this case involves the standard by which "purposeful availment" and "reasonable anticipation" should be measured.

In recent years, the Supreme Court has grappled with this issue through its consideration of the so-called "stream of commerce" theory of personal jurisdiction. In *World-Wide Volkswagen, supra*, the Court considered the claim of two injured motorists that Oklahoma courts had jurisdiction over a New York-based wholesale distributor and its New York automobile retailer, which, plaintiffs contended, had sold them a defective automobile. Plaintiffs had purchased the car in New York and were injured in Oklahoma en route to Arizona. Neither defendant conducted any business in Oklahoma, shipped or sold any products to or in the state, or sought in any way to take advantage of the Oklahoma market.[15] Nevertheless, plaintiffs contended that the defendants could have foreseen that the plaintiffs would drive their vehicle to Oklahoma and suffer injury there, and that such foreseeability provided sufficient basis for Oklahoma's exercise of jurisdiction over the defendants.

The Court rejected this argument, emphasizing that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* at 295, 100 S.Ct. at 566. The Court, however, also rejected the notion that foreseeability is wholly irrelevant to the jurisdictional inquiry, noting that "the foreseeability that is critical to due process analysis is not the mere likelihood that

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[15] Indeed, the Court noted that "there was no showing that any automobile sold by [the distributor or the retailer] has ever entered Oklahoma with the single exception of the vehicle involved in the present case." *World-Wide Volkswagen*, 444 U.S. at 289, 100 S.Ct. at 563.

a product will find its way into the forum State. Rather it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297, 100 S.Ct. at 567. The Court continued:

> [I]f the sale of a product or manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-98, 100 S.Ct. at 567.

The Court concluded that the defendants in *World-Wide Volkswagen*, New York corporations without any association with the Oklahoma market, had not delivered their products into the stream of commerce with the expectation that they would be purchased in Oklahoma. Thus, the Court held that the "stream of commerce" analysis did not furnish a basis for Oklahoma's exercise of jurisdiction over the defendants.

In *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), the Court reassessed its "stream of commerce" analysis in the context of an indemnification action brought in California by Cheng

Shin, a Taiwanese tire manufacturer, against Asahi, the Japanese tire valve manufacturer that had sold an allegedly defective component part to Cheng Shin. The record in that case revealed that Asahi was aware that its tire valves were incorporated into tires that were sold in California.

In a plurality opinion authored by Justice O'Connor, four justices concluded that Asahi did not possess sufficient minimum contacts with California to permit California's exercise of jurisdiction under the Due Process Clause. The plurality determined that minimum contacts did not exist where "the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant's product into the forum State, but the defendant did nothing else to purposefully avail itself of the market in the forum State." *Asahi*, 480 U.S. at 110, 107 S.Ct. at 1031 (O'Connor, J.):

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.

Id. at 112, 107 S.Ct. at 1032 (O'Connor, J.). The plurality concluded that because Asahi (1) did not do business in California, (2) had no office, agents, employees or property in California, (3) did not advertise or otherwise solicit

business in California, and (4) did not create, control or employ the distribution system that brought its valves to California, it did not possess minimum contacts with California. *Id.*

The plurality also concluded that California's exercise of jurisdiction over Asahi in this case did not comport with "traditional notions of fair play and substantial justice," and that therefore, regardless of whether Asahi possessed minimum contacts with California, the State's exercise of jurisdiction over Asahi violated due process. *Id.* at 113-116, 107 S.Ct. at 1033-34.

Justice Brennan, although concurring in the plurality's holding that California's exercise of jurisdiction did not comport with "traditional notions of fair play and substantial justice" and therefore violated due process, did not join the plurality's holding that Asahi did not possess minimum contacts with California.[16] Quoting liberally from *World-Wide Volkswagen*, Justice Brennan emphasized that the "additional conduct" showing required by the plurality was unnecessary, insofar as "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.* 480 U.S. at 117, 107 S.Ct. at 1034 (Brennan, J., concurring in part and concurring in the judgment). Justice Brennan maintained that:

> [A]s long as a participant in [this flow of products] is aware that the final product is being marketed in the

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[16] Justice Brennan was joined by Justices Marshall, Blackmun and White.

> forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State and indirectly benefits from the State's laws that regulate and facilitate commercial activity.

Id. at 117, 107 S.Ct. 1034-35 (Brennan, J., concurring in part and concurring in the judgment).

Finally, Justice Stevens, although concurring in the judgment, also declined to join the plurality's holding regarding minimum contacts on the grounds that that discussion was unnecessary given the plurality's decision regarding the "fair play and substantial justice" prong of the due process analysis.[17] Justice Stevens noted, however, that an analysis of purposeful availment and minimum contacts should take into account "the volume, the value, and the hazardous character of the components," *id.* at 122, 107 S.Ct. at 1037 (Stevens, J., concurring in part and concurring in the judgment), suggesting that "a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' even though the item delivered to the forum State was a standard product marketed throughout the world." *Id.* (Stevens, J., concurring in part and concurring in the judgment).

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[17] Justices White and Blackmun also joined Justice Stevens.

As is evident from the foregoing discussion, the current state of the law regarding personal jurisdiction is unsettled. Because, however, Georgia's exercise of jurisdiction over RNUR in this case is consistent with due process under the more stringent "stream of commerce plus" analysis adopted by the *Asahi* plurality, we need not determine which standard actually controls this case.[18]

[11] Before considering the "stream of commerce plus" analysis in the context of this case, we must address certain issues raised by the appellees that, in our opinion, are irrelevant to our jurisdictional inquiry.

First, the fact that title to the Renault vehicles passed to AMSC in France rather than in the United States in no way determines the degree of contacts between Georgia and RNUR; "'[i]f *International Shoe* stands for anything . . ., it is that a truly interstate business may not shield itself from

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[18] We note, however, that in the absence of further guidance from the Supreme Court, several courts have declined to follow the *Asahi* plurality's analysis, and have instead continued to apply the "stream of commerce" approach adopted in *World-Wide Volkswagen*. *See, e.g., Irving v. Owens-Corning Fiberglass Corp.*, 864 F.2d 383, 386 (5th Cir.), *cert. denied*, 493 U.S. 823, 110 S.Ct. 83, 107 I. Fd.2d 49 (1989); *DeMoss v. City Market, Inc.*, 762 F. Supp. 913, 918 (D. Utah 1991); *Abuan v. General Electric Co.*, 735 F. Supp. 1479, 1483 (D. Guam 1990); *Curtis Management Group v. Academy of Motion Pictures Arts and Sciences*, 717 F. Supp. 1362, 1369 (S.D.Ind. 1989); *Wessinger v. Vetter Corporation*, 685 F. Supp. 769, 776-777 (D. Kan. 1987); *Hall v. Zambelli*, 669 F. Supp., 753, 756 (S.D.W.Va. 1987).

suit by a careful but formalistic structuring of its business dealings.'" *Benitez-Allende v. Alcan Alumino Do Brasil, S.A.*, 857 F.2d 26, 30 (1st Cir.), *cert. denied*, 489 U.S. 1018, 109 S.Ct. 1135, 103 L.Ed.2d 196 (1989) (quoting *Vencedor Manufacturing Co., Inc. v. Gougler Industries*, 557 F.2d 886, 891 (1st Cir. 1977)). *See also Meyers v. Asics Corp.*, 711 F. Supp. 1001, 1005 n. 3 (C.D.Cal. 1989) (citing *Taubler v. Giraud*, 655 F.2d 991, 995 (9th Cir. 1981)); *Sound Move Autoplaza, Inc. v. Nissan Motor Co.*, 1989 WL 50797 at 10, 1989 U.S.Dist.Lexis 5077 at 6 (S.D.N.Y. 1989).

Second, the fact that RNUR did not maintain a physical presence in Georgia is also irrelevant to a determination of whether minimum contacts exist between the defendant and the forum State. *Burger King v. Rudzewicz*, 471 U.S. at 476, 105 S.Ct. at 2184; *Cable/Home Communication Corp. v. Network Productions*, 902 F.2d 829, 858 (11th Cir. 1990).

Third, the appellee argues, and the district court held, that no "alter ego" relationship existed between RNUR and AMSC, and that, consequently, RNUR cannot be said to have purposefully availed itself of the privilege of conducting business in Georgia as a result of the activities of AMSC there. November 19 Order at 10. Although we agree that (1) no "alter ego" relationship existed between AMSC and RNUR, and that (2) to impute the actions of the former to the latter would therefore be improper, the fact that no alter ego relationship existed between the two entities does not mean that RNUR could not possess minimum contacts with Georgia as a result of its own *independent* role in the process that brought the appellant's 1982 Renault LeCar to the United States. The question is not whether the contacts between

AMSC and Georgia establish minimum contacts between Georgia and RNUR, but rather whether RNUR, by virtue of its relationship with AMSC, purposefully availed itself of the privilege of conducting business in Georgia such that it could reasonably anticipate being haled into court there. That RNUR did not exercise sufficient control over AMSC to establish an alter ego relationship does not necessarily mean that it had insufficient contacts with Georgia as a result of its own actions and its participation in the decisions that resulted in AMSC presence and activity in Georgia. *See Warren v. Honda Motor Co., Ltd.*, 669 F. Supp. 365, 369-70 (D. Utah 1987); *Meyers v. Asics Corp.*, 711 F. Supp. at 1005 n. 4. We now proceed to an examination of RNUR's contacts with Georgia under Justice O'Connor's "stream of commerce plus" analysis in *Asahi*.

As noted *supra*, Justice O'Connor stated in *Asahi* that "the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112, 107 S.Ct. at 1032 (O'Connor, J.). It is indisputable that RNUR delivered its vehicles into the "stream of commerce" with the expectation that they would be purchased by consumers in Georgia. The distribution system created by the alliance between Renault and AMC/AMSC contemplated a nationwide network of Renault dealerships; Renault was fully aware that several of those dealerships were in Georgia. Everett Depo. at 35; R3-34-Ex. A, pp. 28-29.

The remaining question under the *Asahi* plurality's analysis is whether RNUR engaged in any additional conduct such that it could be said to have "purposefully availed" itself of the privilege of conducting business in Georgia. We hold

that RNUR did engage in such activity under the standards announced by the *Asahi* plurality.

First, RNUR designed the Renault LeCar for the market in the forum State. *Asahi*, 480 U.S. at 112, 107 S.Ct. at 1032. The record reflects that meetings took place between RNUR and AMC/AMSC officials which resulted in RNUR's modification of its vehicles to accommodate the American market. Everett Depo. at 21, 45-47. Although, as noted by the appellees, there is no evidence in the record that RNUR designed the LeCar specifically for the Georgia market, the fact that RNUR designed its products for the United States generally as part of a nationwide marketing effort, in order to "promote the widest distribution of Renault products," is sufficient to satisfy this prong of the *Asahi* analysis. *In re Perrier Bottled Water Litigation*, 754 F. Supp. 264, 268 (D. Conn. 1990) (holding that Perrier designed its product for the United States market, "which, of course, includes Connecticut and Pennsylvania," because Perrier's liquid containers bore liquid ounce markings rather than metric measure); *Hawes v. Honda Motor Co., Ltd.*, 738 F. Supp. 1247, 1251 (E.D. Ark. 1990); *In Re All Terrain Vehicles Litigation*, 1989 WL 30948, at 8, 1989 U.S. Dist. Lexis 1843, at 10 (E.D.Pa. 1989); *Warren v. Honda Motor Corp.*, 669 F. Supp. at 370.

Second, RNUR advertised its product in the forum State. *Asahi*, 480 U.S. at 112, 107 S.Ct. at 1032. It is undisputed that Renault vehicles, including LeCar, were the subject of a nationwide advertising campaign, and that such advertising reached Georgia. Although, again, it is unclear from the record whether any of the advertising was specifically directed at Georgia, the fact that the LeCar was nationally

advertised, and that such advertising, by virtue of its national scope, reached Georgia is sufficient to establish the necessary relation between Georgia and RNUR. *Morris*, 843 F.2d at 494 (holding that defendant's advertising in national trade magazines sufficient to establish that defendant advertised in forum State); *See also Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1196 (9th Cir. 1988) (nonresident defendant's advertising in, *inter alia*, Town & Country and the Wall Street Journal constituted advertising in California); *Fogle v. Ramsey Winch Co., Inc.*, 774 F. Supp. 19, 22 (D.D.C. 1991); *Cartwright v. Fokker Aircraft*, 713 F. Supp. at 394.

RNUR contends that, to the extent its vehicles were advertised in the United States, AMSC, not RNUR, was exclusively responsible for such advertising. The record does not support this contention. Article XI of the Distributor's Agreement does state that AMSC would have full and exclusive responsibility for advertising Renault products; however, AMSC covenanted to "work closely with Renault in the planning and developing of themes and strategy and the related budget." R3-34-Ex. A, p. 12. The record also reflects that such coordination did in fact occur. Everett Depo. at 16, 20, 21, 24. Further, Renault reserved the right to veto any advertising that it deemed "injurious to Renault's business, . . . likely to mislead or deceive the public, . . . at variance with the business, advertising or public relations policies of Renault, or . . . likely to impair the image or goodwill of Renault." R3-34-Ex. A, p. 13. *See also Id.* at 29; R3-34-Ex. E, p. 15. This reservation indicates that Renault reviewed all advertising before AMSC used it. RNUR placed great emphasis on the nature and quality of the marketing strategies used to market its products, and retained for itself a great

deal of ultimate, if not daily, control over such marketing. Under these circumstances, RNUR, as well as AMSC, was responsible for the marketing and advertising of the LeCar in the United States. *See Sinatra v. National Enquirer*, 854 F.2d at 1197 (nonresident defendant's instructions to American representative to advertise, and defendant's approval of such advertising, established "advertising" contact under *Asahi*).

Third, RNUR, in conjunction with AMSC, established channels for providing regular advice to customers in Georgia. *Asahi*, 480 U.S. at 112, 107 S.Ct. at 1032. By virtue of the frequent reports provided Renault by AMSC, Renault was fully aware that 6 Renault dealerships existed in Georgia. These franchises were established pursuant to the Market Representation Plan, R3-34-Ex. A, p. 4, which incorporated Renault's strategies and vision regarding the distribution of its products.

Although AMSC exercised day-to-day control over the establishment and termination of Renault dealerships in the United States, Renault itself set the terms according to which all these dealerships conducted business: AMSC covenanted to "use its best efforts to assure that Dealers will comply with all sales and service manuals that Renault may from time to time issue relating to the sale and servicing of Renault products and other matters covered by [the Distributor's Agreement] or the Dealer franchises." *Id.* at 14. The Distributor's Agreement also stated that "[A]ny dealership or dealerships operated by [AMSC] for the sale of Renault Products at retail shall at all times satisfy the standards for Renault dealerships prescribed by this Agreement, the Dealer Franchises and the sales and service manuals that Renault may issue from time to time relating to Dealers." *Id.*

Further, RNUR took an active role in training AMSC personnel in the repair, servicing and preparation of Renault products. R3-34-Ex. A, pp. 7-8. Finally, the record reflects that RNUR and AMSC jointly engaged in the financing of retail dealerships throughout the United States. R3-34-Ex. C, pp. 2-3; -Ex. D, pp. 6-7. There is no evidence that the aforementioned six Georgia dealerships were not among those dealerships financed by Renault. *See Morris*, 843 F.2d at 494. Under these circumstances, there is no question but that Renault, as well as AMSC, established channels for providing regular advice to customers in Georgia.

Fourth, RNUR created and controlled the distribution network that brought its products in the United States and Georgia. *Asahi*, 480 U.S. at 112, 107 S.Ct. at 1032. As discussed in detail in Part III.A *supra*, the Distributor's Agreement between RNUR and AMSC created a nationwide network for Renault products, over which Renault retained *ultimate* control through various provisions in the Agreements executed by RNUR and AMC/AMSC, and pursuant to which AMSC's decisions were subject to the review or acquiescence of RNUR. *See generally* R3-34-Ex. A. *See also* R3-34-Ex.B, p. 3, R3-34-Ex. E, pp. 10-13, 15. Further, RNUR was fully involved in the implementation of the Agreements between itself and AMSC/AMC, even though AMSC retained day-to-day control over the nationwide Renault distribution network. *See* pp. 752-53, *supra*. Finally, RNUR's involvement in the Renault distribution network is evidenced by the extensive financial support rendered AMC by RNUR. Such support, described in detail in Section III.B, *supra*, manifested itself in capital investments, reimbursements for marketing and launch costs and infusions of Renault personnel and resources

into AMC/AMSC. RNUR not only enabled AMSC to fulfill its role as Renault's exclusive American distributor, and to operate to RNUR's major financial benefit the very network that RNUR disclaims as the sole responsibility of AMSC. RNUR's support also made AMC/AMSC dependent on RNUR so as to allow the latter significant control over the operations of the former. *See* Section III.C, *supra*.[19]

[12-14] In sum, RNUR designed the Renault LeCar for the Georgia market, advertised the LeCar in Georgia, established channels for customers in Georgia to seek advice about the LeCar, and maintained a distribution network by which LeCars were brought to Georgia. These contacts are sufficiently related to appellant's cause of action to confer specific jurisdiction upon Georgia. RNUR's activities in Georgia were inextricable links in the advertising and distribution network by which the appellant obtained her vehicle, the subject of this product liability suit. More importantly, RNUR directly targeted its LeCars toward Georgia, and thus fairly could expect to defend in Georgia the very type of action this case presents: a personal injury action challenging the car's design and safety. RNUR *intended* its LeCars to be brought to Georgia and took numerous *affirmative* steps to bring that result about, and

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[19] We also note that the additional circumstances suggested by Justice Stevens to establish minimum contacts are present in this case. *Asahi*, 480 U.S. at 122, 107 S.Ct. at 1037 (Stevens, J., concurring in part and concurring in the judgment) (analysis of purposeful availment and minimum contacts should take into account "the volume, the value, and the hazardous character of the components").

jurisdiction in Georgia would not violate RNUR's due process rights.[20]

Because RNUR satisfied all the criteria identified by the *Asahi* plurality as indicative of purposeful availment, we hold that RNUR possessed minimum contacts with Georgia sufficient to satisfy the first prong of the due process inquiry into personal jurisdiction. Through its association with and involvement in the distribution network for Renault products, RNUR benefitted from the protections provided by Georgia law, and was placed on notice that it was subject to suit in Georgia. *WorldWide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567. The fact that RNUR's contacts with Georgia were no greater than its contacts with any other state in which Renault products were sold is of no consequence; RNUR's availment of a national market through its active and profitable association with a national distributor constituted purposeful activity directed at Georgia. *Tomashevsky* v. *Komori Printing Machinery Co., Ltd.*, 715 F.Supp. 1562, 1565 (S.D. Fla.

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[20] Although it would strengthen the case for specific jurisdiction further if appellant had obtained her car in Georgia, purchasing the vehicle in the forum state is not necessary to invoke that jurisdiction. Minimum contacts analysis, with its roots in the Due Process Clause, is a totality of the circumstances inquiry. The Due Process Clause is satisfied when, as here, the litigation is related to the defendant's in-forum activities in such a way that the defendant's due process right to "fair warning" that its activities may subject it to the forum's jurisdiction is protected. *See Burger King*, 471 U.S. at 472, 105 S.Ct. at 2182, 85 L.Ed.2d 528.

1989); *Fogle* v. *Ramsey Winch Co.*, 774 F.Supp. at 22; *In Re Perrier*, 754 F.Supp. at 268.[21]

ii. Fair Play and Substantial Justice

Even if a non-resident defendant possesses minimum contacts with the forum State, the State's exercise of jurisdiction nevertheless violates due process unless it comports with traditional notions of fair play and substantial justice. *International Shoe Co.* v. *Washington*, 326 U.S. at

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[21] *Bond* v. *Octagon Process, Inc.*, 745 F.Supp. 710 (M.D. Ga. 1990), *aff'd*, 926 F.2d 1573 (11th Cir. 1991), does not compel a different result. In that case, which is more analogous to *World-Wide Volkswagen* than to the instant case, the defendant, a New Jersey manufacturer of a cleaning solvent under contract to the Department of Defense ("DOD"), had no contacts with Georgia other than those created by the product's ultimate consumer, which itself transported the product to Georgia. Although the defendant may have known that its product would find its way to Georgia, it did not purposefully avail itself of the Georgia market when it sold its product to a national buyer. Whether DOD sent the product to Georgia or elsewhere was of no consequence to the defendant. RNUR, conversely, availed itself of the Georgia market when it created, funded and directed a distribution network that explicitly envisioned commercial activity in Georgia. Even though the plaintiff in this case actually transported the particular LeCar in question into Georgia, RNUR's activity in Georgia, unlike the activity of the defendants in *Bond* and *World-Wide Volkswagen* in the respective forum States, resulted in significant, if indirect, financial benefits for RNUR, putting it on notice that it could reasonably anticipate being haled into court in Georgia. *World-Wide Volkswagen*, 444 U.S. at 297, 100 S.Ct. at 567.

316, 66 S.Ct. at 158. In determining the fairness and reasonableness of a State's exercise of jurisdiction, a court must consider:

> the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

Asahi, 480 U.S. at 113, 107 S.Ct. at 1033 (quoting *World-Wide Volkswagen*, 444 U.S. at 292, 100 S.Ct. at 564 (citations omitted)). The *Asahi* Court cautioned that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 114, 107 S.Ct. at 1033. The Court also noted, however, that "[w]hen minimum contacts have been established, often the interests of the plaintiff and the forum will justify even the serious burdens placed on the alien defendant." *Id.* Such is the case here.

As noted *supra*, *Asahi* was an indemnification action brought by Cheng Shin, the Taiwanese manufacturer of an allegedly defective tire, against Asahi, the Japanese manufacturer of the component tire valve that Cheng Shin integrated into its final product. The individual injured as a result of the alleged defect in the tire had already obtained relief in the California courts from Cheng Shin, which sought indemnification by Asahi.

The *Asahi* Court, upon consideration of the factors outlined above, determined that California's exercise of jurisdiction over Asahi did not comport with traditional notions of fair play and substantial justice. The Court noted that the burden on Asahi was severe, in that it had to (1) "traverse the distance between [its] headquarters in Japan and the Superior Court of California," and (2) "submit its dispute with Cheng Shin to a foreign nation's judicial system." *Id.* at 114, 107 S.Ct. at 1033. The Court also noted that because the plaintiff, Cheng Shin, was not a California resident, and because the action was "primarily about indemnification rather than safety standards," the interest of the forum State in having the dispute adjudicated there was diminished considerably. Similarly, the defendant's lack of contacts with California lessened the plaintiff's interest in having the dispute adjudicated in California. *Id.* Finally, the Court noted that in an international . . . tions in a State's assertion of jurisdiction over their citizens, as well as the "Federal interest in Government's foreign relations policies," counseled "an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." *Id.* at 115, 107 S.Ct. at 1034. Thus, on the basis of these factors, the Court held that California's exercise of jurisdiction over the plaintiff did not comport with traditional notions of fair play and substantial justice.

This case is different in kind from *Asahi*. First, the plaintiff in this case is not a foreign corporation seeking indemnification from another foreign corporation, as in *Asahi*, but rather a Georgia resident, who seeks relief for the crippling injuries she suffered as a result of an alleged defect

in her Renault LeCar. Her interest in having her case adjudicated in Georgia is manifest.

Second, this case, unlike *Asahi*, is not about indemnification but rather about product safety. Georgia's interest in adjudicating this dispute is also manifest, given that it has a compelling interest in protecting its residents from unsafe products that find their way into the state. *Morris*, 843 F.2d at 495.

Third, RNUR's interest in having this dispute adjudicated abroad is minimal; whereas Asahi was burdened because it was forced to submit its dispute with Cheng Shin to a foreign nation's judicial system, RNUR stands ready to undertake the defense of any lawsuit against AMSC that arises from injuries alleged to have been caused by defects in Renault vehicles, having expressly reserved the right to take over the defense of any lawsuit in the United States involving allegedly defective Renault products. R3-34-Ex. A, pp. 17-18. Thus, subjecting RNUR to Georgia's adjudicatory system works no unfair surprise against it. Moreover, in light of the relative burden that would be caused plaintiff if this case were adjudicated in France, the burdens on RNUR caused by adjudication in Georgia are by no means unfair. *Delong Equipment Co.*, 840 F.2d at 850, 854. ("[A]ny inconvenience caused to [defendants] by subjecting them to the jurisdiction of the Northern District of Georgia is overridden by the greater inconvenience of requiring a Georgia plaintiff, injured in Georgia by the defendants' purposeful activity in and directed at Georgia, to pursue its cause of action in a foreign forum.").

Fourth, although witnesses and evidence concerning the LeCar's manufacture and design are located in France,

evidence and witnesses concerning the accident itself are located primarily in Georgia; furthermore, dismissal of RNUR from the plaintiff's suit would not end the litigation, but would merely splinter it, leaving plaintiff and the other defendants in Georgia, while allowing plaintiff to proceed against RNUR in France. Thus, efficient resolution of this case suggests that jurisdiction be asserted over RNUR in Georgia. *Morris*, 843 F.2d at 495.

In short, this is not "one of those rare cases in which 'minimum requirements inherent in the concept of "fair play and substantial justice" . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'" *Asahi*, 480 U.S. at 116, 107 S.Ct. at 1034 (Brennan, J., concurring in part and concurring in the judgment) (quoting *Burger King* v. *Rudzewicz*, 471 U.S. at 477-78, 105 S.Ct. at 2184-85).

Thus, we hold that RNUR possesses sufficient contacts with Georgia to satisfy due process requirements, and that Georgia's exercise of jurisdiction over RNUR comports with traditional notions of fair play and substantial justice.

V. CONCLUSION

For the foregoing reasons, we conclude that the plaintiff has made out a prima facie case of personal jurisdiction over RNUR. We therefore REVERSE the dismissal of RNUR from the plaintiff's lawsuit, and REMAND this case to the district court for further proceedings consistent with this opinion.

APPENDIX F

Order of Court of Appeals Denying Petition for Rehearing Entered October 1, 1992

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8765

LAURA ANN VERMEULEN,

Plaintiff-Appellant,

—versus—

RENAULT U.S.A., INC.; REGGIE NATIONALE DES USINES RENAULT; JEEP EAGLE SALES CORPORATION; REGIE NATIONALE DES USINES RENAULT AND CHRYSLER,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before KRAVITCH and DUBINA, Circuit Judges, and RONEY, Senior Circuit Judge.

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Order of Court of Appeals Denying
Petition for Rehearing Entered October 1, 1992

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PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ PHYLLIS KRAVITCH
UNITED STATES CIRCUIT JUDGE

APPENDIX G

Statutory and Constitutional Provisions Involved

TITLE 28 OF THE UNITED STATES CODE

§ 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

(Added Pub. L. 94-583, § 2(a), Oct. 21, 1976, 90 Stat. 2891.)

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between --

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title --

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) the word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(As amended July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub. L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub. L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub. L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub. L. 100-702, Title II, §§ 201(a), 202(a), 203(a), 102 Stat. 4646.)

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which state law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be

removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

(As amended Oct. 21, 1976, Pub. L. 94-583, § 6, 90 Stat. 2898; June 19, 1986, Pub. L. 99-336, § 3(a), 100 Stat. 637; Nov. 19, 1988, Pub. L. 100-702, Title X, § 1016(a), 102 Stat. 4669; Dec. 1, 1990, Pub. L. 101-650, Title III, § 312, 104 Stat. 5114.)

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

§ 1603. Definitions

For purposes of this chapter --

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity --

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the

courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892.)

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to --

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which

maritime lien is based upon a commercial activity of the foreign state: *Provided*, That --

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the

same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2892, and amended Pub. L. 100-640, § 1, Nov. 9, 1988, 102 Stat. 3333; Pub. L. 100-669, § 2, Nov. 16, 1988, 102 Stat. 3969; Pub. L. 101-650, Title III, § 325(b)(8), Dec. 1, 1990, 104 Stat. 5121.)

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.)

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim --

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.)

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangements for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of

the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services -- and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state --

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made --

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2894.)

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

(Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2895.)

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if --

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgement establishing rights in property --

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for

purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if --

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if --

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d). (Added Pub. L. 94-583, § 4(a), Oct. 21, 1976, 90 Stat. 2896, and amended Pub. L. 100-640, § 2, Nov. 9, 1988, 102 Stat. 3334; Pub. L. 100-669, § 3, Nov. 16, 1988, 102 Stat. 3969; Pub. L. 101-650, Title III, § 325(b)(9), Dec. 1, 1990, 104 Stat. 5121.)

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if --

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency).

(Added Pub. L. 94-583, §4(a), Oct. 21, 1976, 90 Stat. 2897.)

TITLE 9 OF THE OFFICIAL CODE OF GEORGIA ANNOTATED

O.C.G.A. § 9-10-90 (1992). "Nonresident" defined

As used in this article, the term "nonresident" includes an individual, or a partnership, association, or other legal or commercial entity (other than a corporation) not residing, domiciled, organized, or existing in this state at the time a claim or cause of action under Code Section 9-10-91 arises, or a corporation which is not organized or existing under the laws of this state and is not authorized to do or transact business in this state at the time a claim or cause of action under Code Section 9-10-91 arises. The term "non-resident" shall also include an individual, or a partnership, association, or other legal or commercial entity (other than a corporation) who, at the time a claim or cause of action arises under Code Section 9-10-91, was residing, domiciled, organized, or

existing in this state and subsequently becomes a resident, domiciled, organized, or existing outside of this state as of the date of perfection of service of process as provided by Code Section 9-10-94.

HISTORY: Ga. L. 1968, p. 1419, at 2; Ga. L. 1977, p. 586, at 1.

O.C.G.A. § 9-10-91 (1992). Grounds for exercise of personal jurisdiction over nonresident

A court of this state may exercise personal jurisdiction over any non-resident or his executor or administrator, as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he were a resident of the state, if in person or through an agent, he:

(1) Transacts any business within this state;

(2) Commits a tortious act or omission within this state, except as to a cause of action for defamation of character arising from the act;

(3) Commits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(4) Owns, uses, or possesses any real property situated within this state; or

(5) With respect to proceedings for alimony, child support, or division of property in connection with an action for divorce or with respect to an independent action for support of dependents, maintains a matrimonial domicile in this state at the time of the commencement of this action or, if the defendant resided in this state preceding the commencement of the action, whether cohabiting during that time or not. This paragraph shall not change the residency requirement for filing an action for divorce.

HISTORY: Ga. L. 1966, p. 343, at 1; Ga. L. 1970, p. 443, at 1; Ga. L. 1983, p. 1304, at 1.

NOTES: THE 1983 AMENDMENT, effective March 29, 1983, deleted "or" at the end of paragraph (3); added "or" at the end of paragraph (4); and added paragraph (5).

THE UNITED STATES CONSTITUTION

The Due Process Clause of the Fifth Amendment

No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Due Process Clause of the Fourteenth Amendment

No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

No. 92-1411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

REGIE NATIONALE DES USINES RENAULT S.A.,
Petitioner,

—against—

LAURA ANN VERMEULEN,
Respondent.

SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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April 21, 1993

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IN THE

Supreme Court of the United States

OCTOBER TERM 1992

No. 92-1411

REGIE NATIONALE DES USINES RENAULT S.A.,

Petitioner,

—against—

LAURA ANN VERMEULEN,

Respondent.

SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Pursuant to Supreme Court Rule 15.7, Petitioner Regie Nationale des Usines Renault S.A. ("RNUR") respectfully submits this Supplemental Brief on its Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit filed on February 26, 1993 ("Petition").

Since RNUR filed its Petition, the Court of Appeals has issued two rulings:

First, on March 5, 1993, the Court of Appeals denied RNUR's motion to vacate its judgment because of a mistake of law. (*See* Petition at 2-3.) A copy of the order denying RNUR's motion is reprinted herein as Appendix H.

Second, on March 22, 1993, the Court of Appeals withdrew its earlier opinion and issued a Revised Opinion, reported at __ F.2d 1402 and reprinted herein as Appendix I. The Revised Opinion supersedes the earlier opinion of the Court of Appeals, reported at 965 F.2d 1014, *amended by*, 975 F.2d 746 (11th Cir. 1992), and reprinted at Appendix E to the Petition.

The judgment of the Court of Appeals, however, remains the same: the order of the District Court dismissing the claims against RNUR for lack of personal jurisdiction is reversed and the action is remanded to the District Court for further proceedings (E39; I2,41). Whereas in its earlier decision the Court of Appeals predicated personal jurisdiction on the Georgia long-arm statute based on a theory of diversity jurisdiction (E15-35), the Court of Appeals now holds that there is no diversity jurisdiction and premises personal jurisdiction on the Foreign Sovereign Immunities Act (the "FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*,(I13-16, 22-35).

Notwithstanding the Court of Appeals revised analysis, the principal question presented in the Petition remains the same:

> Under a "stream of commerce" theory of *in personam* jurisdiction, may a federal court exercising jurisdiction pursuant to 28 U.S.C. § 1330 consider an alien defendant's aggregate contacts with the United States in determining whether sufficient "minimum contacts" exist to sustain long-arm jurisdiction, when the defendant has no actual contacts with the forum state relating to the plaintiff's claim?

REVISED OPINION BELOW

The Court of Appeals held in its Revised Opinion

> that [s]ubject matter jurisdiction in this case lies exclusively under the FSIA. The FSIA contains its own long-arm statute for obtaining personal jurisdiction over foreign states. . . . Neither compliance with the forum state's long-arm statute nor minimum contacts between the defendant and the forum state are required. (I40 (citations omitted).)

Rather, the Court of Appeals held "the relevant forum when a case is brought under the FSIA is the United States." (I23 (*citing*, *inter alia*, *Republic of Argentina* v. *Weltover, Inc.*, 112 S.Ct. 2160, 2169 (1992)).) In order to determine whether such an assertion of jurisdiction over RNUR meets the due process requirements of the Fifth Amendment, the Court of Appeals then analyzed RNUR's contacts with the United States under the "stream of commerce plus" theory of personal jurisdiction set forth in Justice O'Connor's plurality opinion in *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102, 108-16 (1987) (I31-39).

Whereas in its prior opinion the Court of Appeals went beyond the pronouncements of *Asahi* and effectively applied a national contacts standard under the Georgia long-arm statute (see Petition at 8-12), in its Revised Opinion the Court of Appeals expressly applies a national contacts test under the purported auspices of the FSIA (I31-39).

First, the Court of Appeals found that "RNUR designed the Renault LeCar for the American market" on the basis that RNUR had modified its vehicles "specifically to accommodate the American market" and to "'promote the widest distribution of Renault products,'" (I31 (quoting from the distributorship agreements)).

Second, the Court of Appeals found that "RNUR advertised its product in the United States" as part of a coordinated effort with its American distributor, AMSC (I31-33).

Third, the Court of Appeals determined that "AMSC exercised day-to-day control over the establishment and termination of Renault dealerships in the United States" (I33); that "RNUR, in conjunction with AMSC, established channels for providing regular advice to customers in the United States" (*id.*); and that RNUR "took an active role in training AMSC personnel in the repair, servicing and preparation of Renault products" (I34). The Court of Appeals based its determination on general national contacts such as: (1) RNUR had reserved the right to set uniform standards to apply to all dealerships in the United States, and (2) "RNUR and AMSC jointly engaged in the financing of retail dealerships throughout the United States." (I33-34.)

Finally, the Court of Appeals determined that there was *prima facie* evidence that "RNUR created and controlled the distribution network that brought its products into the United States" in satisfaction of the fourth prong of the *Asahi* plurality analysis (I34-35). This determination was based on evidence of nationwide contacts: in particular, allegations that "the Distributor's Agreement between RNUR and AMSC created a nationwide network for Renault products, over which Renault retained ultimate control through various provisions in the Agreements executed by RNUR and AMC/AMSC, and pursuant to which AMSC's decisions were subject to the review or acquiescence of RNUR" (I34).

Thus, as in its prior opinion, the Court of Appeals makes no findings of any specific contacts with the Georgia forum related to plaintiff's cause of action, but explicitly rests its holding on a national contacts theory of personal jurisdiction.

As discussed below, however, the categorical application of a national contacts standard under the FSIA in a case involving purely *state law* claims raises important constitutional and statutory questions that should be answered by this Court.

REASONS FOR GRANTING THE WRIT

Under the Court of Appeals' Revised Opinion, a foreign automobile manufacturer whose products are marketed by a distributor in the United States is amenable to suit in any jurisdiction in the United States solely by reason of its "availment of a national market through its active and profitable association with a national distributor" (*see* E33-34; *compare* I35).

This jurisdictional issue is one that will come before the courts on a recurring basis, in virtually any suit involving a product manufactured by a foreign state-owned company and distributed nationally in the United States. Because it is important to the public interest in a properly functioning global marketplace that "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field," *United States* v. *First National CityBank*, 379 U.S. 378, 404 (1965) (Harlan, J. dissenting), this Court should consider and determine the issues presented.

I.
The Court of Appeals Decided an Important Constitutional Issue Relating to the Foreign Sovereign Immunities Act That Should Be Decided by This Court.

In its Revised Opinion, the Court of Appeals held that an assertion of jurisdiction under the FSIA is subject to the limitations imposed by the Due Process Clause of the Fifth Amendment and that "the relevant forum when a case is brought under the FSIA is the United States" (I23).

By determining that RNUR's national contacts with the United States are sufficient to render it amenable to jurisdiction in the Northern District of Georgia, the Court of Appeals resolved a question expressly left open by this Court in *Asahi*, namely:

> whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.

480 U.S. at 113 n.* (citations omitted; emphasis in original).[1/]

[1/] *See also Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d. 300, 313-14 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (due process requires minimum contacts with the United States, not the forum state, when jurisdiction is based on the Foreign Sovereign Immunities Act); *accord Richmark Corp.* v. *Timber Falling Consultants*, (continued...)

This is an important question, and is even more important in the present context, which involves not just an alien defendant, but an alien defendant that is an instrumentality of a foreign state. Moreover, when the FSIA provides the basis of jurisdiction in an action, the underlying claims may be based on state law (as here), federal law or a combination of the two. Thus, this case raises concerns different from those underlying a number of circuit court decisions that have considered a national contacts standard where Congress has provided for nationwide service of process as part of a federal scheme of regulation. *See generally* 4 C. Wright & A. Miller, *Federal Practice and Procedure* §1067.1 (1987 and Supp. 1992); *see also* pp. 8-10 below.

Although this Court has previously assumed without deciding that a foreign sovereign is entitled to due process, *Republic of Argentina* v. *Weltover, Inc.*, 112 S.Ct 2160, 2169 ("[a]ssuming without deciding that a foreign state is a 'person' for purposes of the Due Process Clause"), it has not identified the appropriate forum for purposes of analyzing the minimum contacts needed to sustain personal jurisdiction over

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[1/](...continued)

Inc., 937 F.2d 1444, 1447, 1447 n.2 (9th Cir. 1991) *(quoting Texas Trading* and reaching only the issue of "general personal jurisdiction" and not "specific" jurisdiction); *Gregorian* v. *Izvestia*, 871 F.2d 1515, 1529-30 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989); *Meadows* v. *Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987) *(quoting Texas Trading); Ruiz* v. *Transportes Aereos Militares Ecuadorianos*, 103 F.R.D. 458, 459-60 (D.D.C. 1984) (*citing Texas Trading*); *Harris Corp.* v. *National Iranian Radio and Television*, 691 F.2d 1344, 1352-53 (11th Cir. 1982) *(citing Texas Trading).*

a non-resident defendant. The Court of Appeals' reliance on this Court's decision in *Republic of Argentina* v. *Weltover, Inc.* in fashioning a national contacts test (I23; *see* p. 3 above) is misplaced: in that decision, this Court considered the United States to be the relevant forum for purposes of analyzing subject matter -- and not personal -- jurisdiction. *Id.*, 112 S.Ct. at 2169. Moreover, this Court explicitly noted that "whether there is a constitutional basis for personal jurisdiction . . . is not before the Court as an independent question." *Id.* at n.2.

Accordingly, the constitutional issue has not been addressed explicitly or implicitly by this Court.

II.
The Decision of the Court of Appeals Misconstrues the FSIA

Even if this Court chooses not to decide the above constitutional issue, the Court of Appeals' Revised Opinion should be reviewed because it misconstrues the FSIA, contrary to the intent of Congress.

In applying a "national contacts" test here, the Court of Appeals disregarded the fact that this action involves purely state law claims against RNUR (I13). However, because there are only state law claims asserted in this action, RNUR's amenability to suit in the State of Georgia should be the *same*, after removal of the action to a federal forum pursuant to 28 U.S.C. § 1441(d), as it was when the claims were initially presented to the Superior Court of Fulton County. To hold otherwise -- as the Court of Appeals does in its Revised Opinion by expanding RNUR's amenability on the basis of a "national contacts" test -- is contrary to the legislative intent and purpose of the FSIA.

The purpose of the FSIA was to provide a uniform law respecting the immunity of foreign sovereigns and to provide such defendants access to a federal forum. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (1976), reprinted in 5 U.S.C.C.A.N. 6604 (1976). The legislative history of the FSIA expressly states that the Act is "not intended to affect the substantive law of liability" but to codify the "restrictive" principle of immunity of a foreign sovereign to suit. *Id.* at 6-11, 5 U.S.C.C.A.N. at 6605-10.

It is beyond dispute that, prior to removal of this action to the Northern District of Georgia, RNUR's amenability to suit in Georgia was dependent upon the constitutional reach of the State's long-arm statute. *See generally Restatement (Third) of the Foreign Relations Law of the United States* §458 Comment b at 431 (1987) ("[a]n action against a foreign state brought in a State court and not removed to a federal court may be tried according to the procedures applicable in that State court . . . "). Furthermore, it is fundamental that due process in such circumstances requires a showing of the defendant's minimum contacts with the *forum state* such that the exercise of jurisdiction is consistent with "traditional notions of fair play and substantial justice." Applying a national contacts analysis under a state long-arm statute would exceed the limitations imposed by the Fourteenth Amendment. (*See* Petition at 11-14.)

The effect of the Court of Appeals' decision is to make foreign sovereigns amenable to jurisdiction in every federal district court in the Unites States if they have any contacts with this country. This would render foreign sovereigns subject to federal-court jurisdiction in states with which they have absolutely no connection, and despite the fact that they are not amenable to state-court jurisdiction there. Moreover,

foreign sovereigns alone among alien defendants would be liable to such broad jurisdictional reach.

There is no indication in the legislative history of the FSIA that Congress intended to bring about such an unfair and anomalous result. Nor is it in the interest of the United States to impose such a regime on foreign states and their instrumentalities, which may result in comparable treatment of American entities abroad.

CONCLUSION

For the foregoing remaining reasons, a writ of certiorari should issue to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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April 21, 1993

APPENDIX H

Order of the Court of Appeals
Denying Motion to Vacate

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8765

LAURA ANN VERMEULEN,
Plaintiff—Appellant,

v.

RENAULT U.S.A., INC. ET AL,
REGIE NATIONALE DES USINES RENAULT,
Defendants,
Defendant—Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA.

Before KRAVITCH and DUBINA, Circuit Judges, and RONEY, Senior Circuit Judge.

BY THE COURT:

Appellee's motion to vacate the July 9, 1992 opinion and to vacate the district court's order is denied.

March 5, 1993

APPENDIX I

Revised Opinion of the Court of Appeals

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8765

LAURA ANN VERMEULEN,
Plaintiff—Appellant,

v.

RENAULT, U.S.A., INC.; REGIE NATIONALE DES USINES RENAULT; JEEP EAGLE SALES CORPORATION; REGIE NATIONALE DES USINES RENAULT AND CHRYSLER CORPORATION,
Defendants,
Defendant—Appellee.

March 22, 1993
Opinion, 975 F.2d 746, superseded.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA.

Before KRAVITCH and DUBINA, Circuit Judges, and RONEY, Senior Circuit Judge.

RONEY, Senior Circuit Judge, concurred and filed opinion.

OPINION: KRAVITCH, Circuit Judge:

Like the Phoenix rising from the ashes, this case returns for us to address once again the district court's dismissal of appellant Vermeulen's claims for lack of personal jurisdiction. This panel previously rendered an opinion reversing the district court, *Vermeulen* v. *Renault U.S.A., Inc.*, 965 F.2d 1014, amended by, 975 F.2d 746 (11th Cir. 1992), but our mandate has not yet issued. Now, we again modify our opinion, reversing the district court, although on grounds different from those stated in our previous opinion. Accordingly, we substitute for our earlier opinion the following revised opinion.

REVISED OPINION

I.

On February 16, 1988, Laura Ann Vermeulen suffered an accident while driving her 1982 Renault LeCar near Lawrenceville, Georgia. She sustained a spinal injury that left her a quadriplegic. Vermeulen had purchased the car in January 1988 from her brother. At the time of the purchase, both siblings were residents of North Carolina. Shortly thereafter, but prior to the accident, Vermeulen moved to Georgia.

Appellee Regie Nationale Des Usines Renault (RNUR or Renault), the manufacturer and designer of the 1982 LeCar, is a corporation wholly owned by the French government.

A.

In 1979, RNUR entered into a series of commercial agreements with American Motors Corporation (AMC) and its wholly owned subsidiary, American Motors Sales Corporation (AMSC), pursuant to which AMSC agreed to act

as the exclusive marketer and distributor of Renault automobiles in the United States.[1/] It is undisputed that AMSC distributed the 1982 Renault LeCar at issue in this case under this distribution arrangement. The stated goals of the agreements between RNUR and AMC/AMSC were, among other things, "to promote the widest distribution of Renault products," and to "develop a dealer network for Renault products in the [United States]." R3-34-Ex. A, at 1. Accordingly, AMSC agreed to purchase Renault vehicles, including LeCars, in France from RNUR, and to import them for resale in the United States.

Although the distribution agreement indicated that AMSC would take full responsibility for marketing and distributing Renault vehicles in the United States, *id.* at 4, the parties contemplated that Renault would be fully involved in decisions affecting the sales of its product. AMSC covenanted to "use its best efforts to carry out the Market Representation Plan." *Id.* at 6. This plan, not itself part of the record but referenced and defined in the Distributor's Agreement, was a "mutually agreed upon plan, initialled on behalf of the parties [to the Distributor Agreement], for the franchising of

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[1/] The agreements executed between Renault and AMC/AMSC include: a "Distributor Agreement," R3-34-Ex.A; a "Built-Up Sales Agreement," R3-34-Ex.B; and a "Master Agreement," R3-34-Ex.E. These agreements contemplated several different commercial arrangements between the parties, including the manufacture of Renault cars at AMC's American plants and Renault's European distribution of AMC vehicles. Thus, the distribution arrangement between AMSC and Renault regarding the United States market was only one aspect of a wide-ranging alliance created by the parties through these agreements.

Dealers to sell Renault products within the [United States]." *Id.* at 3.

The Distributor's Agreement also provided that "Renault may from time to time advise [AMSC] of suggested retail prices for Renault vehicles." *Id.* at 6. Further, the Built-Up Sales Agreement indicated that "the estimated quantities of Renault Products to be purchased and sold hereunder during any Contract Year shall be mutually agreed." R3-34-Ex.B, at 2.[2]

Although the Distributor Agreement provided that AMSC would take responsibility for maintaining "a sufficient number of trained and competent personnel" and for instructing such personnel concerning the preparation, servicing and repair of Renault products, it also stated that RNUR would "use its best efforts to provide [AMSC] with suitable assistance in connection with [such] training and instruction responsibilities." R3-34-Ex.A, at 7-8.

Article VII of the Distributor Agreement contemplated that AMSC would maintain responsibility for "determining

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[2] RNUR contends that AMSC had sole responsibility for determining the quantity and type of vehicles to be purchased from RNUR. Brief of Appellee at 22. When, as in this case, however, the district court has not conducted an evidentiary hearing, and the evidence presented by the parties' affidavits and deposition testimony conflicts, the court must construe all reasonable inferences in favor of the plaintiff. *Delong Equipment Co.* v. *Washington Mills Abrasive Co.*, 840 F.2d 843, 845 (11th Cir. 1988); *Morris* v. *SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988). Therefore, we accept as true plaintiff's allegation that RNUR was fully involved in determining the quantity of cars to be purchased by AMSC from Renault.

assortments, minimum quantities, geographical distribution and other matters relating to" parts and accessories offered for sale by Renault pursuant to the Sales Agreements entered into by the parties. The Distributor's Agreement provided, however, that AMSC would "discuss such matters with Renault and give serious consideration to Renault's recommendations." *Id.* at 8.

Article IX of the Agreement stated that AMSC "shall print such business forms, bearing Renault trademarks and Renault trade names, for exclusive use in its 'Renault' business as Renault and [AMSC] shall mutually agree," and that AMSC would "cause each Dealer ... to maintain such portions of its facilities as are dedicated to product identification and signage in conformity with Renault standards and as mutually agreed." *Id.* at 10.

Under Article X of the Agreement, Renault retained the full and exclusive right to and ownership of the "Renault" trademark. The Agreement provided that "any particular use of any [Renault] trademark which, in the sole judgment of Renault, is inconsistent with the image or goodwill of Renault or its business, advertising or public relations policies, will be discontinued immediately after the same comes to the attention of Renault if Renault so notifies [AMSC]." *Id.* at 11.

Although Article XI of the Agreement provided that AMSC would retain full and exclusive responsibility for advertising, promoting and merchandising Renault products, AMSC covenanted to "work closely with Renault in the planning and developing of themes and strategy and the related budget"; to "build upon the Renault name and image as the manufacturer and designer of outstanding small cars"; and to "verify the technical content of any representation

concerning Renault Products." *Id.* at 12. Article XI continued:

> [AMSC] shall not publish or permit to be published any advertising material relating to Renault Products which is likely to mislead or deceive the public or to impair the image or good will of Renault or the reputation of Renault Products. If Renault notifies [AMSC] that any advertising is injurious to Renault's business, or is likely to mislead or deceive the public, or is at variance with the business, advertising or public relations policies of Renault, or is likely to impair the image or good will of Renault, [AMSC] agrees to discontinue immediately any such advertising.

Id. at 13.

In Article XII, AMSC agreed to appoint AMC/Renault dealers in accordance with the Market Representation Plan discussed above and undertook to "use its best efforts to assure that Dealers will comply with all sales and service manuals that Renault may from time to time issue relating to the sale and servicing of Renault Products and other matters covered by this Agreement or the Dealer Franchises." *Id.* at 14. Article XII also stated that "any dealership or dealerships operated by [AMSC] for the sale of Renault Products at retail shall at all times satisfy the standards for Renault dealerships prescribed by this Agreement, the Dealer Franchises and the sales and service manuals that Renault may issue from time to time relating to Dealers." *Id.* AMSC was responsible for

the actual appointment, training and termination of such dealers. *Id.* at 13.[3]

Under Article XIII, Renault warranted its products to AMSC. *Id.* at 14. Although AMSC warranted the product to the ultimate consumer, Renault covenanted to reimburse AMSC "for warranty work performed by [AMSC] itself or by Dealers within [the United States] with respect to Renault vehicles sold therein." *Id.* at 15. Article XIII also provided that RNUR would hold harmless and indemnify AMSC against any judgment resulting from lawsuits commenced against AMSC seeking damages for alleged design or other defects in Renault products, and permitted Renault to take over the defense of any such lawsuit if Renault so chose. *Id.* at 17-18.

Article XV of the Agreement required AMSC to provide RNUR on a regular basis with certain reports and records pertaining to the distribution of Renault products. AMSC was required to provide Renault with (1) a monthly written analysis of its inventories of Renault products; (2) thrice-monthly reports of the then-current dealer stocks of Renault vehicles and the sales of Renault vehicles during the preceding 10-day period; (3) a quarterly report of all Dealer Franchise Agreements entered into during the preceding quarter, a list of all terminations of dealers during that quarter, and an opinion report assessing the impact of such new franchises and terminations on the Market

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[3] The "Dealer Franchises," as defined in the Distributor Agreement, were "Renault Dealer Franchise Agreements" drafted by the parties, a sample of which was attached to the Distributor Agreement as Annex A-1.

Representation Plan. *Id.* at 28. AMSC also agreed to "furnish to Renault such written reports of compliance with the Market Representation Plan, and such marketing and customer satisfaction reports, as Renault may from time to time reasonably request." *Id.* at 29.

Finally, Article XVI of the Agreement stated explicitly that "this Agreement does not constitute [AMSC] the agent or legal representative of Renault for any purpose whatsoever." *Id.* at 29.

The Master Agreement between Renault and AMC, R3-34-Ex.E, also contained certain provisions relevant to the new distribution arrangements between RNUR and AMC/AMSC. Prior to 1979, Renault U.S.A., RNUR's wholly-owned American subsidiary, had acted as RNUR's distributor in the United States. Under Section 4(c) of the Master Agreement, Renault agreed to cause Renault U.S.A. to transfer all its capital stock in several of the latter's distribution subsidiaries to AMC, and to cause Renault U.S.A. to sell to AMC certain inventories held by those subsidiaries or by Renault U.S.A. itself. R3-34-Ex.E, at 10-11.[4/] The Master Agreement also provided that "AMC will cause [AMSC] to fulfill all the obligations and responsibilities of Renault's distribution subsidiaries as distributors under the terms of the Renault dealer franchises in effect at the respective times of the transfers.... In accordance with its franchising procedures, [AMSC] will also

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[4/] Renault U.S.A. continues to exist today, but does not play a role in the distribution of Renault products in the United States. Renault U.S.A. played no role in the distribution of the 1982 Renault LeCar at issue in this case.

offer to reenfranchise ... dealers who are parties to a franchise with any such subsidiary at such times of transfer, provided such dealers are desirous of the same." *Id.* at 12-13. Finally, Section 4(c) provided that "AMC will offer employment on its customary terms to those officers and employees of Renault U.S.A. heretofore agreed upon by Renault U.S.A. and AMC." *Id.* at 13.

Section 4(e) of the Agreement created a "Policy Committee" consisting of equal numbers of "senior executives" from each company. This committee was charged with the responsibility "for reviewing the matters contemplated by this Agreement, and for recommending solutions to policy conflicts that may arise between them in connection therewith." *Id.* at 15. Section 4(e) also stated that "no decision shall be taken by either party with respect to the image or product positioning of the products of either party except by mutual agreement." *Id.*

B.

Implementation of the new alliance between RNUR and AMC/AMSC took many forms. First, through a number of financial agreements, RNUR invested significant amounts of capital into AMC. Between the years 1979 and 1984, RNUR committed $545,100,000.00 to AMC through various stock, warrant, and debenture purchases. R2-27-Ex.6, at 28.[5/] Under these agreements, Renault gained the right to "place certain limitations on the future incurrence by [AMC] of secured indebtedness for borrowed money and [limit] the use

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[5/] For a complete chronology and discussion of these financial transactions, see R2-27-Ex.2, at 28; -Ex.3, at 4-5; -Ex.4, at 21-22; -Ex.5, at 22-23; and -Ex.6, at 26-27.

of the proceeds of the sales pursuant to the agreement." R2-27-Ex.3, at 29. As a result of this financial commitment, AMC was able to negotiate a new five-year bank credit agreement for an additional $250 million. R2-27-Ex.3, at 5. Ultimately, Renault came to own 46.4% of AMC's capital stock, and to hold options on AMC stock that could make RNUR the majority stockholder in AMC. R2-27-Ex.2, at 2. RNUR's investments in AMC were crucial to the latter's health and future prospects during the economically unstable early 1980s. R2-27-Ex.2, at 1; -Ex.3, at 2.

Second, AMC and RNUR agreed to the "expansion of domestic wholesale financing available to the Company's AMC, Jeep and Renault dealers, the financing of fleet sales and the making of capital loans to dealers to whom wholesale financing is also provided," with an eye toward "establishing a full-service financial company, to support AMC, Jeep and Renault sales in the U.S. and Canada." R2-27-Ex.2, at 18. This financial company, dubbed American Motors Financial Corp. (AMFC), was ultimately formed pursuant to a joint venture between AMC and Renault Credit Internationale S.A. (RCI), a wholly-owned subsidiary of RNUR. RCI held a 50% interest in AMFC, which operations were later expanded to include retail financing as well as dealership financing. R3-34-Ex.C, at 2-3; -Ex.D, at 6-7.

Third, RNUR also reimbursed AMC for launch costs, marketing, and other operating programs in the amounts of more than $6 million in 1980, more than $22 million in 1981, more than $91 million in 1982, and more than $28 million in 1983. R2-27-Ex.4, at 21; -Ex.5, at 26.

Throughout this time period, RNUR maintained several seats on the AMC Board of Directors, although not on the AMSC Board. *See, e.g.*, R2-27-Ex.2, at 47; -Ex.3, at 40;

and -Ex.4, at 30. Further, Renault U.S.A. or RNUR would send its executives to work in key positions in AMC or AMSC. Deposition of Richard Willman, at 15. Renault U.S.A. leased these employees to AMC, but retained them on its own account. *Id.* at 18.[6/]

The actual process of sale and resale of Renault vehicles in the United States took the following course: as noted above, AMSC purchased the Renault vehicles in France and exported them to the United States; the decision as to where in the United States to send the Renault vehicles rested with AMSC. R1-23-Ex.A. Renault officials met several times yearly, and engaged in frequent conversations by phone, with representatives from AMC/AMSC regarding the production, distribution, and promotion of Renault vehicles. Deposition of Richard Everett, at 16, 20. During these meetings, the participants from both companies exchanged ideas regarding volume forecasts, monthly projections for orders, changes in vehicle specifications, and marketing strategies. *Id.* at 21, 24. This exchange of ideas resulted in modifications of Renault vehicles designed to accommodate the American market. *Id.* at 45-47. RNUR built those vehicles bound for the United States in conformance with federal regulations governing automobile production in this country. *Id.* at 17. RNUR was aware of the number of Renault dealerships in the United States; RNUR officials from time to time toured these dealerships. *Id.* at 35.

[6/] During this time, several members of AMC's management team, including Jose Dedeurwaerder, AMC's President from 1982-1984 and CEO in 1985 and 1986, were former employees of Renault. *See, e.g.*, R2-27-Ex.3, at 2; -Ex.7, at 3.

C.

As of December 1980, there were 1302 Renault franchised dealers in the United States. R2-27-Ex.2, at 3.[7] These dealerships, as well as all other Renault dealerships in the world, were listed as part of the "Renault Network" in a pamphlet found in the glove compartment of Vermeulen's LeCar. This pamphlet, dated March 1981 and bearing the Renault trademark, stated that Renault's "16,800 Branches, Distributors and Dealers throughout the world are just like helpful neighbors, being qualified and equipped to offer the motorist all the services he requires for driving with peace of mind." Everett Depo., Ex.1.[8]

RNUR profited immensely from its alliance with AMC/AMSC. In 1980, RNUR led all auto manufacturers in import sales improvement with a 34% increase over 1979 volume. R2-27-Ex.2, at 3. RNUR led in the same category in 1981, increasing its import sales 22% over 1980 volume. R2-27-Ex.3, at 2. Renault sold more than 37,000 vehicles to AMSC in both 1980 and 1981, more than 50,000 vehicles in 1982, and more than 40,000 vehicles in 1983, earning over $1.3 billion dollars as a result of purchases of Renault cars, components, and service parts during that four-year period. R2-27-Ex.4, at 21; -Ex.5, at 26. Sales of LeCars comprised a large percentage of these import sales. *See, e.g.*, R2-27-Ex.3, at 8. In 1984, the United States was the largest

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[7] Renault dealerships existed in 49 out of 50 states. Everett Depo., Ex. 1.

[8] It is unclear whether AMSC, RNUR, or any other entity was responsible for the creation of this pamphlet and its placement in the glove compartment of Vermeulen's LeCar.

market for Renault sales outside of France. R2-27-Ex.6, at 14.

II.

On April 18, 1989, Vermeulen filed suit in the Superior Court of Fulton County, Georgia against RNUR, Renault U.S.A.,[2/] and Jeep Eagle Sales Corporation (Jeep Eagle), the successor to AMC. Vermeulen alleged that the injuries she suffered in the February 16, 1988 accident were the result of the negligent manufacture and design of the LeCar's passenger restraint system. The defendants removed the case to the United States District Court for the Northern District of Georgia, asserting diversity of citizenship as their source of federal subject matter jurisdiction. See 28 U.S.C. § 1332. RNUR then moved to dismiss the case against it for lack of personal jurisdiction. See Fed. R. Civ. P. 12(b)(2).

The district court granted RNUR's motion to dismiss without conducting an evidentiary hearing on the issue. *Vermeulen* v. *Renault U.S.A., Inc.*, No. 1:89-cv-1042-HTW (N.D. Ga. November 19, 1990). The court held that the exercise of jurisdiction over RNUR by a federal court situated in the State of Georgia would violate both the Georgia long-arm statute, O.C.G.A. § 9-10-91, and the Due Process Clause of the Fourteenth Amendment. Vermeulen appealed from the district court's order of dismissal.

III.

A.

Longstanding principles of federal law oblige us to inquire *sua sponte* whenever a doubt arises as to the existence

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[2/] Renault U.S.A. was subsequently dismissed as a defendant pursuant to a stipulation between the parties. R3-45.

of federal jurisdiction. *E.g.*, *Metropolitan Washington Airports Auth.* v. *Citizens for the Abatement of Aircraft Noise, Inc.*, ___ U.S. ___, ___n. 13, 111 S. Ct. 2298, 2306 n. 13, 115 L. Ed. 2d 236 (1991); *Mt. Healthy City School Dist.* v. *Doyle*, 429 U.S. 274, 278, 97 S. Ct. 568, 572, 50 L. Ed. 2d 471 (1977); *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 740, 96 S. Ct. 1202, 1204, 47 L. Ed. 2d 435 (1976); *Louisville & Nashville R. Co.* v. *Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 43, 53 L. Ed. 126 (1908), *overruled on other grounds*, 255 U.S. 180, 41 S. Ct. 243, 65 L. Ed. 577 (1921); *Mansfield, Coldwater & Lake Michigan R. Co.* v. *Swan*, 111 U.S. 379, 382, 4 S. Ct. 510, 511, 28 L. Ed. 462 (1884). Such a doubt exists in this case. Thus, before we may consider the merits of Vermeulen's appeal, we must confirm whether Vermeulen's action is even properly before the federal courts.

When the defendants removed this case to federal court, they asserted federal jurisdiction based on diversity of citizenship. Diversity of citizenship exists between

> (1) citizens of different States;
> (2) citizens of a State and citizens or subjects of a foreign state;
> (3) citizens of different States [when] citizens or subjects of a foreign state are additional parties; and
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a) (emphasis added). For diversity jurisdiction under 28 U.S.C. § 1332, all defendants must be diverse from all plaintiffs. *See, e.g.*, *Strawbridge* v. *Curtiss*, 7 U.S. (3 Cranch) 267, 267, 2 L. Ed. 435 (1806), *overruled on other grounds*, 43 U.S. (2 How.) 497, 11 L. Ed. 353

(1844); *Cabalceta* v. *Standard Fruit Co.*, 883 F.2d 1553, 1557 (11th Cir. 1989).

RNUR is a corporation wholly owned by the Government of France. Under 28 U.S.C. § 1603, an entity "a majority of whose shares or other ownership interest is owned by a foreign state" is itself deemed a "foreign state" for purposes of federal jurisdiction. *Arango* v. *Guzman Travel Advisors*, 761 F.2d 1527, 1533 (11th Cir.), *cert. denied*, 474 U.S. 995, 106 S. Ct. 408, 88 L. Ed. 2d 359 (1985).[10/] As such, it is not considered a "citizen" or "subject" of a foreign state for purposes of section 1332(a). *Goar* v. *Compania Peruana de Vapores*, 688 F.2d 417, 421 (5th Cir.1982); *Ruggiero* v. *Compania Peruana de Vapores*, 639 F.2d 872, 875-76 (2d Cir.1981); *see Arango*, 761 F.2d at 1532-33. Consequently, RNUR does not fit into any of the

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[10/] Section 1603 provides in relevant part:

> (a) A "foreign state," except as used in section 1608 of this title, includes ... an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity --
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) ... a majority of whose shares or other ownership interest is owned by a foreign state ... and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country. 28 U.S.C. § 1603.

categories of parties which trigger diversity jurisdiction.[11] Although Vermeulen and defendant Jeep Eagle are diverse parties under section 1332(a)(1),[12] absent diversity between Vermeulen and RNUR the requirement of complete diversity among the parties is not met. Thus, federal jurisdiction does not exist in this case on the basis of diversity of citizenship. Before we can proceed to the merits of Vermeulen's appeal, we must determine whether a separate basis of federal subject matter jurisdiction exists.

B.

The only possible source of federal jurisdiction in suits against corporations owned by foreign states is 28 U.S.C. § 1330(a), the subject matter jurisdiction provision relating to the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub.L. 94-583, 90 Stat. 2892 (currently codified at 28

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[11] Prior to 1976, section 1332(a)(2) expressly provided for diversity suits against foreign states. 28 U.S.C. § 1332(a) (1970). The 1976 amendments to this section removed that provision, making it clear that foreign states, as defined in 28 U.S.C. § 1603, are not subject to jurisdiction on a diversity of citizenship theory. *See, e.g., Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 n.5, 109 S. Ct. 683, 689 n.5, 102 L. Ed. 2d 818 (1989); H.R.Rep. No. 1487 at 14, reprinted in 1976 U.S.C.C.A.N. 6604, 6613 ("Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, [*see* Part IV.B. of this opinion *infra*,] a similar jurisdictional basis under section 1332 becomes superfluous.").

[12] Vermeulen is a citizen of Georgia. Jeep Eagle, which is incorporated in Delaware and has its principal place of business in Michigan, is a citizen of both those states.

U.S.C. §§ 1602-11 (1988 & Supp. II 1990)). *Goar*, 688 F.2d at 421; *Rex* v. *Cia. Peruana de Vapores, S.A.*, 660 F.2d 61, 64 (3d Cir.1981), *cert. denied*, 456 U.S. 926, 102 S. Ct. 1971, 72 L. Ed. 2d 441 (1982); *Williams* v. *Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir.1981), *cert. denied*, 455 U.S. 982, 102 S. Ct. 1490, 71 L. Ed. 2d 691 (1982); *see Arango*, 761 F.2d at 1532-33; *see also Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683, 688, 102 L. Ed. 2d 818 (1989) (holding that Foreign Sovereign Immunities Act is sole basis for obtaining jurisdiction over a foreign state as defined in 28 U.S.C. § 1603). Section 1330(a) provides for federal jurisdiction in all cases against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a). Hence, jurisdiction over a foreign state turns on the existence of a statutory or treaty-based exception to foreign sovereign immunity. This is only logical. If a foreign state is immune from suit in the United States, federal jurisdiction does not lie.

Several exceptions to foreign state immunity are enumerated in 28 U.S.C. § 1605. Subsection (a)(2) of this statute details three exceptions for causes of action arising out of a foreign state's commercial activities. This subsection provides that a foreign state shall not be immune from suit in an American court in any action based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in

connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). Because Vermeulen's allegations satisfy the third clause of section 1605(a)(2), we conclude that federal jurisdiction exists in this case.

C.

The acts upon which Vermeulen's claims against RNUR are based are the allegedly negligent design and manufacture of the 1982 LeCar passenger restraint system. Under the third clause of section 1605(a)(2), therefore, RNUR is not immune from suit in the United States—and thus federal jurisdiction exists—if the design and manufacture of the LeCar restraint system occurred outside the territory of the United States; was done in connection with a commercial activity outside the United States; and caused a direct effect in the United States.

RNUR concedes that it designed and manufactured Vermeulen's LeCar in France. *See, e.g.*, Brief of Appellee at 5. Thus, the only issues are whether those acts were taken in connection with a commercial activity of RNUR outside, and whether they had a direct effect inside, the United States.

1.

The FSIA defines "commercial activity" as either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). Last Term, in *Republic of Argentina* v. *Weltover, Inc.*, ___ U.S. ____, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992), the Supreme Court

expounded on this rather vague definition. The Court explained that the FSIA, and particularly the commercial activity exceptions to immunity, "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity." ___ U.S. at ____, 112 S. Ct. at 2165 (*citing Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-89, 103 S. Ct. 1962, 1967-69, 76 L. Ed. 2d 81 (1983)). This theory "would not bar a suit based upon a foreign state's participation in the marketplace in the manner of a private citizen or corporation." *Id.*, ___ U.S. at ____, 112 S. Ct. at 2166 (*citing Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 698-705, 96 S. Ct. 1854, 1863-66, 48 L. Ed. 2d 301 (1976) (plurality opinion)). Accordingly, the Court concluded that "when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.*

Applying these principles to the instant case, RNUR's design and manufacture of the Renault LeCar unquestionably were acts connected to a commercial activity of RNUR outside the United States. RNUR designed and built LeCars in order to sell them throughout the world. The sale of merchandise is a quintessential commercial activity. In designing and manufacturing cars for sale, RNUR acted not in any governmental capacity, "but in the manner of a private player," no different from General Motors, Ford, or any other privately owned automobile manufacturer. Indeed, in its brief to this court RNUR admitted that its dealings with AMC and AMSC were "arms length, commercial relationships." Brief of Appellee at 8; *see also id.* at 6 ("RNUR entered a series of commercial agreements with American Motors Corporation...."). RNUR sold the vehicles to AMC/AMSC

in France for import into the United States. *See, e.g., id.* at 5-6. We conclude, therefore, that RNUR's design and manufacture of the 1982 LeCar passenger restraint system were acts performed in connection with a commercial activity of RNUR outside the United States.[13]

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[13] The fact that Vermeulen seeks to recover for personal injuries does not belie the commercial nature of RNUR's activity and thus does not require us to analyze this case under the "noncommercial torts" exception to foreign sovereign immunity, 28 U.S.C. § 1605(a)(5). Section 1605(a)(5) provides for jurisdiction in American courts in any case not otherwise encompassed in [the paragraph on commercial activities] in which money damages are sought against a foreign state for personal injury or death, subject to certain enumerated exceptions. *Id.* (emphasis added). The legislative history of the third commercial activity exception in section 1605(a)(2) states that Congress intended to subject foreign commercial conduct to jurisdiction "consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." H.R.Rep. No. 94-1487 at 19, 1976 U.S.C.C.A.N. at 6618. The Restatement provides for jurisdiction when "the conduct and its effect are generally recognized as constituent elements of a ... tort under the law of states that have reasonably developed legal systems." Restatement (Second) of the Foreign Relations Law of the United States § 18, at 47 (1965). Negligent design and manufacture of an automobile resulting in personal injury unquestionably is a tort generally recognized in American law. Thus, Vermeulen's claims are properly within the third commercial activity exception to foreign sovereign immunity contained in 28 U.S.C. § 1605(a)(2). *See Ohntrup* v. *Firearms Center, Inc.*, 516 F.

(continued...)

2.

The remaining question is whether the allegedly negligent design and manufacture of the LeCar passenger restraint system had a "direct effect" in the United States. In Republic of Argentina, the Supreme Court rejected the suggestion that "direct effect" means a substantial or foreseeable effect. ___ U.S. at ____, 112 S. Ct. at 2168. Rather the Court held that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's ... activity.'" *Id.* (*quoting Weltover, Inc.* v. *Republic of Argentina*, 941 F.2d 145, 152 (2d Cir.1991)).

The complaint in this case alleges that the injuries Vermeulen suffered in an automobile accident on the roads of Georgia were the result of RNUR's negligent design and manufacture of the LeCar passenger restraint system. We can hardly imagine a more immediate consequence of the defendant's activity. Thus, under the definition articulated in

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[13](...continued)

Supp. 1281, 1285 (E.D. Pa. 1981) ("Personal injury suits are within the scope of this exception."), *aff'd*, 760 F.2d 259 (3d Cir. 1985); *see also Martin* v. *Republic of South Africa*, 836 F.2d 91, 93 (2d Cir. 1987) (applying section 1605(a)(2) in ordinary personal injury case); *Zernicek* v. *Brown & Root, Inc.*, 826 F.2d 415, 418 (5th Cir. 1987) (same), *cert. denied*, 484 U.S. 1043, 108 S. Ct. 775, 98 L. Ed. 2d 862 (1988); *Australian Gov't Aircraft Factories* v. *Lynne*, 743 F.2d 672, 674 (9th Cir. 1984) (same), *cert. denied*, 469 U.S. 1214, 105 S. Ct. 1189, 84 L. Ed. 2d 335 (1985); *Sugarman* v. *Aeromexico, Inc.*, 626 F.2d 270, 272 (3d Cir. 1980) (same); *Four Corners Helicopters, Inc.* v. *Turbomeca S.A.*, 677 F. Supp. 1096, 1099 (D. Colo. 1988) (same).

Republic of Argentina, the act upon which Vermeulen's claim is based had a direct effect in the United States.

The *Republic of Argentina* Court acknowledged that the "direct effect" element of section 1605(a)(2) might be construed as embodying the "minimum contacts" test of *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945). ___ U.S. at ____, 112 S. Ct. at 2169; *see also Waukesha Engine Div., Dresser Americas, Inc.* v. *Banco Nacional de Fomento Cooperativo*, 485 F. Supp. 490, 492 (E.D. Wis. 1980) (holding that legislative history shows that minimum contacts test is incorporated in jurisdictional provisions of FSIA). Arguably, if the direct effect requirement were not so interpreted, the exercise of federal subject matter jurisdiction pursuant to the FSIA could, in a given case, violate the Due Process Clause of the Fifth Amendment. *Republic of Argentina*, ___ U.S. at ____, 112 S. Ct. at 2169. Nevertheless, the Court did not resolve whether section 1605(a)(2) incorporates the minimum contacts test. Instead it assumed that the Due Process Clause confines the exercise of jurisdiction against foreign states and found that Argentina possessed minimum contacts that would satisfy the constitutional test. *Id.* Because we similarly conclude that RNUR possessed minimum contacts to satisfy the Due Process Clause, we likewise hold that the exercise of federal jurisdiction in this case would not violate RNUR's constitutional rights.

3.

a.

A defendant is constitutionally amenable to a forum's specific jurisdiction if it possesses sufficient minimum contacts with the forum to satisfy due process requirements, and if the forum's exercise of jurisdiction comports with

"'traditional notions of fair play and substantial justice.'" *International Shoe Co.*, 326 U.S. at 316, 66 S. Ct. at 158 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278 (1940)); *Morris*, 843 F.2d at 492. This two-part test embodies the controlling due process principle that a defendant must have "fair warning" that a particular activity may subject it to the jurisdiction of a foreign sovereign. *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2181, 85 L. Ed. 2d 528 (1985); *Madara* v. *Hall*, 916 F.2d 1510, 1516 (11th Cir. 1990). The relevant forum when a case is brought under the FSIA is the United States. *See, e.g., Republic of Argentina*, ___ U.S. at ____, 112 S. Ct. at 2169 (holding that "Argentina '"purposefully availed itself of the privilege of conducting activities within the [United States]"'") (quoting *Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183 (quoting *Hanson* v. *Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283 (1958))) (brackets in *Republic of Argentina*); *Alberti* v. *Empresa Nicaraguense de la Carne*, 705 F.2d 250, 252 (7th Cir. 1983); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S. Ct. 1012, 71 L. Ed. 2d 301 (1982); *Ruiz* v. *Transportes Aereos Militares Ecuadorianos*, 103 F.R.D. 458, 459 (D.D.C.1984).

To constitute constitutionally minimum contacts, the defendant's contacts with the applicable forum must satisfy three criteria. First, the contacts must be related to the plaintiff's cause of action or have given rise to it. *Burger King*, 471 U.S. at 472, 105 S. Ct. at 2181; *Madara*, 916 F.2d at 1516. Second, the contacts must involve "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum ..., thus

invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253, 78 S. Ct. at 1240; *see also Burger King*, 471 U.S. at 474-75, 105 S. Ct. at 2183-84. Third, the defendant's contacts with the forum must be "such that [the defendant] should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980).

b.

In recent years, the Supreme Court has grappled with the "purposeful availment" and "reasonable anticipation" elements of this test through its consideration of the so-called "stream of commerce" theory of personal jurisdiction. In *World-Wide Volkswagen*, the Court considered the claim of two injured motorists that Oklahoma courts had jurisdiction over a New York-based wholesale distributor and its New York automobile retailer, which, plaintiffs contended, had sold them a defective automobile. Plaintiffs had purchased the car in New York and were injured in Oklahoma en route to Arizona. Neither defendant conducted any business in Oklahoma, shipped or sold any products to or in the state, or sought in any way to take advantage of the Oklahoma market.[14/] Nevertheless, plaintiffs contended that the defendants could have foreseen that the plaintiffs would drive their vehicle to Oklahoma and suffer injury there, and that such foreseeability provided sufficient basis for Oklahoma's exercise of jurisdiction over the defendants.

[14/] Indeed, the Court noted that "there was no showing that any automobile sold by [the distributor or the retailer] has ever entered Oklahoma with the single exception of the vehicle involved in the present case." *World-Wide Volkswagen*, 444 U.S. at 289, 100 S. Ct. at 563.

The Court rejected this argument, emphasizing that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* at 295, 100 S. Ct. at 566. The Court, however, also rejected the notion that foreseeability is irrelevant to the jurisdictional inquiry, noting that "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297, 100 S. Ct. at 567. The Court continued:

> If the sale of a product or manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-98, 100 S. Ct. at 567.

The Court concluded that the defendants in World-Wide Volkswagen, New York corporations without any association with the Oklahoma market, had not delivered their products into the stream of commerce with the expectation that they would be purchased in Oklahoma. Thus, the Court held that

the "stream of commerce" analysis did not furnish a basis for Oklahoma's exercise of jurisdiction over the defendants.

In *Asahi Metal Industry Co.* v. *Superior Court of California,* 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), the Court reassessed its "stream of commerce" analysis in the context of an indemnification action brought in California by Cheng Shin, a Taiwanese tire manufacturer, against Asahi, the Japanese tire valve manufacturer that had sold an allegedly defective component part to Cheng Shin. The record in that case revealed that Asahi was aware that its tire valves were incorporated into tires that were sold in California.

In a plurality opinion authored by Justice O'Connor, four Justices concluded that Asahi did not possess sufficient minimum contacts with California to permit California's exercise of jurisdiction under the Due Process Clause. The plurality determined that minimum contacts did not exist when "the defendant acted by placing a product in the stream of commerce, and the stream eventually swept defendant's product into the forum State, but the defendant did nothing else to purposefully avail itself of the market in the forum State." *Id.* at 110, 107 S. Ct. at 1031 (plurality opinion).

> The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who

> has agreed to serve as the sales agent in the forum State.

Id. at 112, 107 S. Ct. at 1032 (plurality opinion). The plurality concluded that because Asahi did not do business in California; had no office, agents, employees, or property in California; did not advertise or otherwise solicit business in California; and did not create, control, or employ the distribution system that brought its valves to California, it did not possess minimum contacts with California. *Id.*

The plurality also concluded that California's exercise of jurisdiction over Asahi in this case did not comport with "traditional notions of fair play and substantial justice," and that therefore, regardless of whether Asahi possessed minimum contacts with California, the State's exercise of jurisdiction over Asahi violated due process. *Id.* at 113-116, 107 S. Ct. at 1033-34.

Justice Brennan, although concurring in the plurality's holding that California's exercise of jurisdiction did not comport with "traditional notions of fair play and substantial justice" and therefore violated due process, did not join the plurality's holding that Asahi did not possess minimum contacts with California.[15/] Quoting liberally from *World-Wide Volkswagen*, Justice Brennan emphasized that the "additional conduct" showing required by the plurality was unnecessary, insofar as "the stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.* at 117, 107 S. Ct. at 1034 (Brennan, J.,

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[15/] Justice Brennan was joined by Justices Marshall, Blackmun and White.

concurring in part and concurring in the judgment). Justice Brennan maintained that:

> As long as a participant in [this flow of products] is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. Nor will the litigation present a burden for which there is no corresponding benefit. A defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State and indirectly benefits from the State's laws that regulate and facilitate commercial activity.

Id. at 117, 107 S. Ct. 1034-35 (Brennan, J., concurring in part and concurring in the judgment).

Finally, Justice Stevens, although concurring in the judgment, also declined to join the plurality's holding regarding minimum contacts on the grounds that that discussion was unnecessary given the plurality's decision regarding the "fair play and substantial justice" prong of the due process analysis.[16/] Justice Stevens noted, however, that an analysis of purposeful availment and minimum contacts should take into account "the volume, the value, and the hazardous character of the components," id. at 122, 107 S. Ct. at 1037 (Stevens, J., concurring in part and concurring in the judgment), suggesting that "a regular course of dealing that results in deliveries of over 100,000 units annually over a period of several years would constitute 'purposeful availment' even though the item delivered to the forum State

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[16/] Justices White and Blackmun also joined Justice Stevens.

was a standard product marketed throughout the world." *Id.* (Stevens, J., concurring in part and concurring in the judgment).

As is evident from the foregoing discussion, the current state of the law regarding personal jurisdiction is unsettled. Because jurisdiction in the United States over RNUR in this case, however, is consistent with due process under the more stringent "stream of commerce plus" analysis adopted by the Asahi plurality, we need not determine which standard actually controls this case.[17]

Preliminarily, we note that the fact that title to the Renault vehicles passed to AMSC in France rather than in the United States in no way determines the degree of contacts between the United States and RNUR. "'If *International Shoe* stands for anything ..., it is that a truly interstate [or international] business may not shield itself from suit by a careful but formalistic structuring of its business dealings.'"

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[17] We note, however, that in the absence of further guidance from the Supreme Court, several courts have declined to follow the Asahi plurality's analysis, and have instead continued to apply the "stream of commerce" approach adopted in *World-Wide Volkswagen*. *See, e.g., Irving* v. *Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir.), *cert. denied*, 493 U.S. 823, 110 S. Ct. 83, 107 L. Ed. 2d 49 (1989); *DeMoss* v. *City Market, Inc.*, 762 F. Supp. 913, 918 (D. Utah 1991); *Abuan* v. *General Electric Co.*, 735 F. Supp. 1479, 1483 (D. Guam 1990); *Curtis Management Group* v. *Academy of Motion Picture Arts and Sciences*, 717 F. Supp. 1362, 1369 (S.D. Ind. 1989); *Wessinger* v. *Vetter Corp.*, 685 F. Supp. 769, 776-77 (D. Kan. 1987); *Hall* v. *Zambelli*, 669 F. Supp. 753, 756 (S.D. W.Va. 1987).

Benitez-Allende v. *Alcan Aluminio Do Brasil, S.A.*, 857 F.2d 26, 30 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018, 109 S. Ct. 1135, 103 L. Ed. 2d 196 (1989) (quoting *Vencedor Manufacturing Co.* v. *Gougler Industries*, 557 F.2d 886, 891 (1st Cir. 1977)); *see also Meyers* v. *ASICS Corp.*, 711 F. Supp. 1001, 1005 n.3 (C.D.Cal. 1989) (citing *Taubler* v. *Giraud*, 655 F.2d 991, 995 (9th Cir. 1981)); *Sound Move Autoplaza, Inc.* v. *Nissan Motor Co.*, 1989 WL 50797 at 8, 1989 U.S.Dist. Lexis 5077 at 6 (S.D.N.Y. 1989). Likewise, the fact that RNUR did not maintain a direct physical presence in the United States does not necessarily mean that no minimum contacts exist between the defendant and this country. *Burger King*, 471 U.S. at 476, 105 S. Ct. at 2184; *Cable/Home Communication Corp.* v. *Network Productions*, 902 F.2d 829, 858 (11th Cir. 1990). Finally, we recognize that no "alter ego" relationship existed between RNUR and AMSC. Thus, AMSC's obvious contacts with the United States are not imputed to RNUR. This is not to say, however, that RNUR does not possess minimum contacts with the United States as a result of its own independent role in the process that brought the appellant's 1982 Renault LeCar to the United States. *See Warren* v. *Honda Motor Co.*, 669 F. Supp. 365, 369-70 (D. Utah 1987); *ASICS Corp.*, 711 F. Supp. at 1005 n.4. We now proceed to an examination of RNUR's contacts with the United States under Justice O'Connor's "stream of commerce plus" analysis in Asahi.

As noted above, Justice O'Connor stated in Asahi that "the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi*, 480 U.S. at 112, 107 S. Ct. at 1032 (emphasis added). It is indisputable that RNUR delivered its vehicles into the "stream of commerce"

with the expectation that they would be purchased by consumers in the United States. The distribution system created by the alliance between Renault and AMC/AMSC contemplated a nationwide network of Renault dealerships. Everett Depo. at 35; R-34-Ex.A, at 28-29.

The remaining question under the Asahi plurality's analysis is whether RNUR engaged in any additional conduct such that it could be said to have "purposefully availed" itself of the privilege of conducting business in the United States. We hold that RNUR did engage in such activity under the standards announced by the Asahi plurality.

First, RNUR designed the Renault LeCar for the American market. *Asahi*, 480 U.S. at 112, 107 S. Ct. at 1032. The record reflects that meetings took place between RNUR and AMC/AMSC officials which resulted in RNUR's modification of its vehicles specifically to accommodate the American market. Everett Depo. at 21, 45-47. RNUR did this to "promote the widest distribution of Renault products." R3-34-Ex.A, at 1. *Compare In re Perrier Bottled Water Litigation*, 754 F. Supp. 264, 268 (D. Conn. 1990) (holding that Perrier designed its product for the United States market because Perrier's liquid containers bore liquid ounce markings rather than metric measure); *Hawes* v. *Honda Motor Co.*, 738 F. Supp. 1247, 1251 (E.D. Ark. 1990); *In re All Terrain Vehicles Litigation*, 1989 WL 30948, at 4, 1989 U.S.Dist. Lexis 1843, at 10 (E.D. Pa.1989); Warren, 669 F. Supp. at 370.

Second, RNUR advertised its product in the United States. *Asahi*, 480 U.S. at 112, 107 S. Ct. at 1032. It is undisputed that Renault vehicles, including the LeCar, were the subject of a nationwide advertising campaign. See *Morris*, 843 F.2d at 494 (holding defendant's advertising in national

trade magazines sufficient to establish that defendant advertised in forum state); see also *Sinatra* v. *National Enquirer, Inc.*, 854 F.2d 1191, 1196 (9th Cir. 1988) (nonresident defendant's advertising in, among other publications, Town & Country and The Wall Street Journal constituted advertising in California); *Fogle* v. *Ramsey Winch Co.*, 774 F. Supp. 19, 22 (D.D.C.1991); *Cartwright* v. *Fokker Aircraft*, 713 F. Supp. 389, 394 (N.D. Ga.1988). RNUR had a large hand in directing that campaign. Article XI of the Distributor's Agreement does state that AMSC would have full and exclusive responsibility for advertising Renault products; AMSC, however, covenanted to "work closely with Renault in the planning and developing of themes and strategy and the related budget." R3-34-Ex.A, at 12. The record reflects that such coordination did in fact occur. Everett Depo. at 16, 20, 21, 24. Furthermore, Renault reserved the right to veto any advertising that it deemed "injurious to Renault's business, ... likely to mislead or deceive the public, ... at variance with the business, advertising or public relations policies of Renault, or ... likely to impair the image or goodwill of Renault." R3-34-Ex.A, at 13; *see id.* at 29; R3-34-Ex.E, at 15. This reservation indicates that Renault reviewed all advertising before AMSC used it. RNUR placed great emphasis on the nature and quality of the marketing strategies used to market its products, and retained for itself a great deal of ultimate, if not daily, control over such marketing. Under these circumstances, RNUR, as well as AMSC, was responsible for the marketing and advertising of the LeCar in the United States. See *Sinatra*, 854 F.2d at 1197 (nonresident defendant's instructions to American representative to

advertise, and defendant's approval of such advertising, established "advertising" contact under *Asahi*).

Third, RNUR, in conjunction with AMSC, established channels for providing regular advice to customers in the United States. *Asahi*, 480 U.S. at 112, 107 S. Ct. at 1032. Numerous Renault dealerships existed throughout the United States. These franchises were established pursuant to the Market Representation Plan, R3-34-Ex.A, at 4, which incorporated Renault's strategies and vision regarding the distribution of its products.

Although AMSC exercised day-to-day control over the establishment and termination of Renault dealerships in the United States, Renault itself set the terms according to which all these dealerships conducted business: AMSC covenanted to "use its best efforts to assure that Dealers will comply with all sales and service manuals that Renault may from time to time issue relating to the sale and servicing of Renault products and other matters covered by [the Distributor's Agreement] or the Dealer franchises." *Id.* at 14. The Distributor's Agreement also stated that "Any dealership or dealerships operated by [AMSC] for the sale of Renault Products at retail shall at all times satisfy the standards for Renault dealerships prescribed by this Agreement, the Dealer Franchises and the sales and service manuals that Renault may issue from time to time relating to Dealers." *Id.*

Further, RNUR took an active role in training AMSC personnel in the repair, servicing, and preparation of Renault products. R3-34-Ex.A, at 7-8. Finally, the record reflects that RNUR and AMSC jointly engaged in the financing of retail dealerships throughout the United States. R3-34-Ex.C, at 2-3; -Ex.D, at 6-7. Under these circumstances, there is no question but that Renault, as well as AMSC, established

channels for providing regular advice to customers in the United States.

Fourth, RNUR created and controlled the distribution network that brought its products into the United States. *Asahi*, 480 U.S. at 112, 107 S. Ct. at 1032. As discussed in detail in Part I.A. of this opinion, the Distributor's Agreement between RNUR and AMSC created a nationwide network for Renault products, over which Renault retained ultimate control through various provisions in the Agreements executed by RNUR and AMC/AMSC, and pursuant to which AMSC's decisions were subject to the review or acquiescence of RNUR. *See generally* R3-34-Ex.A. *See also* R3-34-Ex.B; R3-34-Ex.E. Further, RNUR was fully involved in the implementation of the Agreements between itself and AMSC/AMC, even though AMSC retained day-to-day control over the nationwide Renault distribution network. Finally, RNUR's involvement in the Renault distribution network is evidenced by the extensive financial support rendered AMC by RNUR. Such support, described in detail in Part I.B. above, manifested itself in capital investments, reimbursements for marketing and launch costs, and infusions of Renault personnel and resources into AMC/AMSC. RNUR not only enabled AMSC to fulfill its role as Renault's exclusive American distributor and to operate to RNUR's major financial benefit the very network that RNUR disclaims as the sole responsibility of AMSC; RNUR's support also made AMC/AMSC dependent on RNUR so as to allow the

latter significant control over the operations of the former. *See supra* Part I.C.[18/]

In sum, RNUR designed the Renault LeCar for the American market, advertised the LeCar in the United States, established channels for customers in the United States to seek advice about the LeCar, and maintained a distribution network by which LeCars were imported into the United States. These contacts are sufficiently related to appellant's cause of action to confer specific jurisdiction upon the United States. RNUR's activities were inextricable links in the advertising and distribution network by which the appellant obtained her vehicle, the subject of this product liability suit. More important, RNUR directly targeted its LeCars toward the United States and thus fairly could expect to defend in this country the very type of action this case presents: a personal injury action challenging the car's design and safety. RNUR intended its LeCars to be brought to the United States and took numerous affirmative steps to bring that result about, and jurisdiction in this country would not violate RNUR's due process rights. Because RNUR satisfied all the criteria identified by the *Asahi* plurality as indicative of purposeful availment, we hold that RNUR possessed minimum contacts with the United States sufficient to satisfy the first prong of the due process inquiry.

[18/] We also note that the additional circumstances suggested by Justice Stevens to establish minimum contacts are present in this case. *Asahi*, 480 U.S. at 122, 107 S. Ct. at 1037 (Stevens, J., concurring in part and concurring in the judgment) (analysis of purposeful availment and minimum contacts should take into account "the volume, the value, and the hazardous character of the components").

c.

Even if a nonresident defendant possesses minimum contacts with the forum, the exercise of jurisdiction nevertheless violates due process unless it comports with traditional notions of fair play and substantial justice. *International Shoe Co.*, 326 U.S. at 316, 66 S. Ct. at 158. In determining the fairness and reasonableness of a forum's exercise of jurisdiction, a court must consider, among other things, "the burden on the defendant, the interests of the forum ..., and the plaintiff's interest in obtaining relief." *Asahi*, 480 U.S. at 113, 107 S. Ct. at 1033 (quoting *World-Wide Volkswagen*, 444 U.S. at 292, 100 S. Ct. at 564 (citations omitted)). The *Asahi* Court cautioned that "the unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." 480 U.S. at 114, 107 S. Ct. at 1033. The Court also noted, however, that "when minimum contacts have been established, often the interests of the plaintiff and the forum will justify even the serious burdens placed on the alien defendant." *Id.* Such is the case here.

As reported above, *Asahi* was an indemnification action brought by Cheng Shin, the Taiwanese manufacturer of an allegedly defective tire, against Asahi, the Japanese manufacturer of the component tire valve that Cheng Shin integrated into its final product. The individual injured as a result of the alleged defect in the tire had already obtained relief in the California courts from Cheng Shin, which sought indemnification by Asahi.

The *Asahi* Court, upon consideration of the factors outlined above, determined that California's exercise of

jurisdiction over Asahi did not comport with traditional notions of fair play and substantial justice. The Court noted that the burden on Asahi was severe, in that it had to "traverse the distance between [its] headquarters in Japan and the Superior Court of California," and "submit its dispute with Cheng Shin to a foreign nation's judicial system." *Id.* at 114, 107 S. Ct. at 1033. The Court also noted that because the plaintiff, Cheng Shin, was not a California resident, and because the action was "primarily about indemnification rather than safety standards," the interest of the forum State in having the dispute adjudicated there was diminished considerably. *Id.* Similarly, the defendant's lack of contacts with California lessened the plaintiff's interest in having the dispute adjudicated in California. *Id.* Finally, the Court noted that in an international context, the interests of foreign nations in a State's assertion of jurisdiction over their citizens, as well as the "federal interest in Government's foreign relations policies," counseled "an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State." *Id.* at 115, 107 S. Ct. at 1034. Thus, on the basis of these factors, the Court held that California's exercise of jurisdiction over the plaintiff did not comport with traditional notions of fair play and substantial justice.

This case is different in kind from *Asahi*. First, the plaintiff in this case is not a foreign corporation seeking indemnification from another foreign corporation, as in *Asahi*, but rather a United States citizen who seeks relief for the crippling injuries she suffered as a result of an alleged defect in her Renault LeCar. Her interest in having her case adjudicated in this country is manifest.

Second, this case, unlike *Asahi*, is not about indemnification but rather about product safety. The interest of the United States in adjudicating this dispute is also manifest, given that it has a compelling interest in protecting persons within its borders from unsafe products that find their way into the country. *Morris*, 843 F.2d at 495.

Third, RNUR's interest in having this dispute adjudicated abroad is minimal; whereas Asahi was burdened because it was forced to submit its dispute with Cheng Shin to a foreign nation's judicial system, RNUR stands ready to undertake the defense of any lawsuit against AMSC that arises from injuries alleged to have been caused by defects in Renault vehicles, having expressly reserved the right to take over the defense of any lawsuit in the United States involving allegedly defective Renault products. R3-34-Ex.A, at 17-18. Thus, subjecting RNUR to the American judicial system works no unfair surprise against it. Moreover, in light of the relative burden that would be caused Vermeulen if this case were adjudicated in France, the burdens on RNUR caused by adjudication in this country are by no means unfair. *See Delong Equipment Co.*, 840 F.2d at 850, 854 ("Any inconvenience caused to [defendants] by subjecting them to the jurisdiction of the Northern District of Georgia is overridden by the greater inconvenience of requiring a Georgia plaintiff, injured in Georgia by the defendants' purposeful activity in and directed at Georgia, to pursue its cause of action in a foreign forum.").

Fourth, although witnesses and evidence concerning the LeCar's manufacture and design are located in France, evidence and witnesses concerning the accident itself are located primarily in Georgia. Furthermore, dismissal of RNUR from Vermeulen's suit would not end the litigation,

but would merely splinter it, leaving Vermeulen and the other defendants in Georgia, while forcing Vermeulen to proceed against RNUR, if at all, in France. Thus, efficient resolution of this case suggests that jurisdiction be asserted over RNUR in the United States. *Morris*, 843 F.2d at 495.

In short, this is not "one of those rare cases in which 'minimum requirements inherent in the concept of "fair play and substantial justice" ... defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.'" *Asahi*, 480 U.S. at 116, 107 S. Ct. at 1034 (Brennan, J., concurring in part and concurring in the judgment) (*quoting Burger King*, 471 U.S. at 477-78, 105 S. Ct. at 2184-85).

Thus, we hold that RNUR possesses sufficient contacts with the United States to satisfy due process requirements, and that jurisdiction in an American court over RNUR comports with traditional notions of fair play and substantial justice.

D.

RNUR's design and manufacture of the 1982 Renault LeCar in France was an act which was taken in connection with a commercial activity under the FSIA and which had a direct effect in the United States. Accordingly, federal jurisdiction exists in this case.

IV.

Having determined that federal jurisdiction lies in this case, we may consider the merits of Vermeulen's appeal. We review *de novo* the district court's dismissal for lack of *in personam* jurisdiction. *E.g.*, *Olivier* v. *Merritt Dredging Co.*, 954 F.2d 1553, 1555 (11th Cir. 1992).

The district court held that its exercise of personal jurisdiction over RNUR would violate both the Georgia

long-arm statute and the Due Process Clause of the Fourteenth Amendment, the latter because RNUR did not have constitutionally minimum contacts with the State of Georgia. In so holding, the court acted under the misapprehension that federal jurisdiction in this case was based on diversity of citizenship. This was the theory argued by the parties. In a diversity action, a federal court may assert jurisdiction over a nonresident defendant only to the extent permitted by the long-arm statute of the forum state, and only if the exercise of jurisdiction comports with the requirements of due process, namely that minimum contacts exist between the defendant and the forum state and that jurisdiction be consistent with traditional notions of fair play and substantial justice. *Morris*, 843 F.2d at 492 n.3; *Gold Kist, Inc.* v. *Baskin Robbins Ice Cream*, 623 F.2d 375, 377 (5th Cir. 1980).[19/]

Subject matter jurisdiction in this case lies exclusively under the FSIA. The FSIA contains its own long-arm statute for obtaining personal jurisdiction over foreign states. Under 28 U.S.C. § 1330(b), "personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction ... where service has been made under [28 U.S.C. § 1608]." Neither compliance with the forum state's long-arm statute nor minimum contacts between the defendant and the forum state are required. *See, e.g.*, *Republic of Argentina*, ___ U.S. at

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[19/] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as circuit precedent all decisions of the former Fifth Circuit rendered before October 1, 1981.

___, 112 S. Ct. at 2169 (holding that "Argentina '"purposefully availed itself of the privilege of conducting activities within the [United States]"'") (*quoting Burger King*, 471 U.S. at 475, 105 S. Ct. at 2183 (*quoting Hanson*, 357 U.S. at 253, 78 S. Ct. at 1240)) (brackets in *Republic of Argentina*; emphasis added); *Alberti*, 705 F.2d at 252; *Texas Trading*, 647 F.2d at 314 (holding that relevant forum for due process analysis in claims brought under FSIA is United States, not particular forum state); *Ruiz*, 103 F.R.D. at 459 (same). Hence, the district court erred in dismissing Vermeulen's claims against RNUR for lack of personal jurisdiction on the ground that such jurisdiction was improper under both the Georgia long-arm statute and *International Shoe Co.* v. *Washington*.

The judgment of the district court is REVERSED. The case is REMANDED to the district court for further proceedings consistent with this opinion.

RONEY, Senior Circuit Judge, concurring:

I concur in the decision of the court, but would cast it in somewhat different terms. This panel previously rendered an opinion on July 9, 1992 reversing the district court, *Vermeulen* v. *Renault U.S.A., Inc.*, 965 F.2d 1014, amended by, 975 F.2d 746 (11th Cir. 1992). On December 28, 1992, more than six months thereafter, appellee, Regie Nationale Des Usines Renault ("RNUR"), having apparently employed another firm of attorneys, has filed a "Motion to Vacate Order," asserting for the first time that, as a French government-owned corporation, it is a "foreign state" for purposes of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1604-08, and is not a "citizen" or

"subject" of a foreign state for purposes of 28 U.S.C. § 1332 governing diversity of citizenship. RNUR had asserted in the district court and in this court only that the federal court lacked jurisdiction based upon § 1332 and the Georgia long-arm statute. It did not assert any lack of jurisdiction based upon immunity.

In denying the motion to vacate our order reversing the district court's decision based on the minimum contacts required for diversity jurisdiction, I would hold four things: First, I would hold that RNUR has waived any ground of jurisdiction not initially asserted in the district court. Although sovereign immunity goes to subject matter jurisdiction, which normally cannot be waived and is noticeable by a court at any stage of the litigation, the unique jurisdictional grant provided for in the FSIA allows a foreign state, by waiving its immunity, to waive what would otherwise be a defect in subject matter jurisdiction of the federal court. *Canadian Overseas Ores Ltd.* v. *Compania de Acero Del Pacifico S.A.*, 528 F. Supp. 1337 (D.C.N.Y. 1982), *affirmed on other grounds*, 727 F.2d 274 (2d Cir. 1984). Personal jurisdiction can, of course, always be waived and I would hold RNUR has waived any ground of personal jurisdiction not submitted to the district court or argued on appeal. *Insurance Corp.* v. *Compagnie des Bauxites*, 456 U.S. 694, 703-05, 102 S. Ct. 2099, 2104-05, 72 L. Ed. 2d 492 (1982).

Second, I concur in the court's opinion that, although federal subject matter jurisdiction does not exist on the basis of diversity of citizenship, federal jurisdiction does exist in this case under 28 U.S.C. §§ 1330(a) and 1605(a)(2).

Third, I would hold, as the court does, that the minimum contacts test under the due process clause of the

Constitution and the Georgia long-arm statute, although that statute is not applicable in this case, is essentially the same test that a court should apply under the long-arm statute in the Foreign Sovereign Immunities Act. Thus the decision of the district court and the prior decision of this court which reversed, applied the correct test. Therefore, all that the district court said and all that we said regarding the contacts of RNUR with the forum state would be equally applicable under the FSIA long-arm statute. Thus there is no need to remand this case to the district court for its consideration under the proper statute, as requested by RNUR. We need not decide the wider issue as to whether contacts elsewhere in the United States would be sufficient in this case, since the issue as presented to the district court and this court was based on contacts with Georgia, the forum state.

Fourth, I fully concur in the court's opinion that RNUR had sufficient contacts with the United States and Georgia to satisfy the requirements of the FSIA long-arm statute and the due process requirements of the Constitution.

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No. 92-1411

In The

Supreme Court of the United States

October Term, 1992

REGIE NATIONALE DES USINES RENAULT, S.A.,

Petitioner,

vs.

LAURA ANN VERMEULEN,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly determined that Regie Nationale des Usines Renault (RNUR) had sufficient contacts with the state of Georgia to support the exercise of jurisdiction in a product liability action alleging the defective design of a model of automobile?

2. Whether RNUR's alleged entitlement to treatment as a foreign sovereign, never raised in the trial court, compels a finding that personal jurisdiction over RNUR did not exist?

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No. 92-1411

In The

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REGIE NATIONALE DES USINES RENAULT, S.A.,

Petitioner,

vs.

LAURA ANN VERMEULEN,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENT

Respondent in the above-styled action respectfully opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. None of the considerations justifying review on certiorari are met in this case. Accordingly, Respondent requests that the Petition be denied.

CITATION TO OPINIONS BELOW

The opinions by the Eleventh Circuit Court of Appeals are officially reported. The opinion upon which RNUR's petition is based is reported as *Vermeulen v.*

Renault U.S.A., Inc., 975 F.2d 746 (11th Cir. 1992) (Appendix E to the petition). That opinion was superseded on March 22, 1993, in *Vermeulen v. Renault U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993). Citations to facts and legal findings of the Eleventh Circuit in this brief are cited to these opinions.

STATEMENT OF THE CASE

On February 16, 1988, Laura Ann Vermeulen had a wreck near Lawrenceville, Georgia. 975 F.2d at 748. She sustained a spinal injury that has left her quadriplegic. *Id.* On April 18, 1989, she filed suit against, among others, Regie Nationale des Usines Renault (RNUR), alleging that her injuries arose out of the defective design of the passenger restraint system in her Renault LeCar. *Id.*

Ms. Vermeulen did not buy her car from a Renault dealer; she bought it from her brother when both were residents of North Carolina. *Id.* Later, and prior to her wreck, Ms. Vermeulen became a resident of Georgia.

Soon after suit was filed, RNUR moved to dismiss the complaint against it on the ground of lack of personal jurisdiction. *Id.* In opposition to the motion Ms. Vermeulen submitted evidence in the form of several written agreements between RNUR and American Motors Sales Corporation (AMSC) relating to the importation and distribution of cars manufactured by RNUR. 975 F.2d at 749. Under these agreements, at all times relevant to the complaint AMSC was the exclusive marketer and distributor of Renault cars in the United States, *Id.*, and therefore was

obviously the exclusive marketer and distributor in Georgia.

The expressly stated goal of the agreements between AMSC and RNUR was to promote the widest distribution of Renault products and to develop a dealer network for Renault products in the United States. *Id.* These purposes were achieved through AMSC's permissive use of the Renault trademark, 975 F.2d at 750; cooperative planning and development of themes and strategies, *Id.*; advertising in all states, *Id.*; and appointment of Renault dealers by AMSC. *Id.*

These dealerships were created through a joint venture in which RNUR and American Motors Corporation provided financing for the dealers' operations. 975 F.2d at 751. Six dealerships were located in Georgia. 975 F.2d at 752. A booklet in the LeCar owned by Laura Ann Vermeulen advised the owner that Renault's "16,800 Branches, Distributors, and Dealers throughout the world are just like helpful neighbors, being qualified and equipped to offer the motorist all the services he requires for driving with peace of mind". *Id.*

Recognizing that the sale of automobiles would give rise to legal claims regarding those automobiles, RNUR agreed to reimburse AMSC for warranty work on Renault cars. 975 F.2d at 750. RNUR also agreed to hold AMSC harmless and indemnify it against any judgment from a lawsuit alleging design or other defects in Renault cars. *Id.* RNUR reserved the right to take over the defense of any lawsuit naming AMSC if it chose to do so. *Id.*

RNUR profited as a result of these activities. In 1980, RNUR led all auto manufacturers in import sales

improvement. 975 F.2d at 753. It led the same category in 1981. *Id.* More than 37,000 Renaults were sold in the United States in both 1980 and 1981, more than 50,000 in 1982, and more than 40,000 in 1983. *Id.* The sale of these vehicles and components and service parts earned over $1.3 billion dollars during that four year period. *Id.* In 1984, the United States was the largest market for Renault sales outside of France. *Id.*

RNUR does not contest any of these facts. What these facts and their logical inferences establish is that RNUR purposefully acted to create and service a market for its cars in all states in this country. The sole question presented for review is whether, because RNUR's contacts with the state of Georgia were identical to its contacts with the other forty-nine states, it is immune from jurisdiction in Georgia for a claim of a design defect in one model of its cars.

SUMMARY OF THE ARGUMENT

Evidence that a manufacturer intended to distribute its products in every state of the United States is, at a minimum, circumstantial evidence that it intended to distribute its products in Georgia. Evidence that RNUR designed the LeCar for all states, that it advertised the LeCar in all states, that it established dealerships in all states and directed the owner to particular dealerships in Georgia for repairs, and that it marketed the LeCar through AMSC who agreed to serve as the sales agent in all fifty states, is sufficient prima facie evidence of jurisdictional contacts to comport with the due process clause.

It is not necessary that the particular car that caused the Plaintiff's injuries be sold in the forum state. The requirement for the exercise of jurisdiction is that the claim be related to the defendant's forum-directed activities. Where, as here, a design defect is alleged, it is sufficient that the specific LeCar came to Georgia as the inevitable result of the system created by RNUR.

RNUR never raised the issue of the Foreign Sovereign Immunities Act until after its motion for rehearing or en banc consideration was denied by the Eleventh Circuit. Like any other affirmative defense, this defense was waived by failure to present it to the trial court.

Even had the FSIA issue been properly raised and preserved, it has no effect on the issue of personal jurisdiction. The requirements of due process are the same whether considered under the Fifth Amendment or the Fourteenth Amendment. RNUR's contacts with Georgia were sufficient to support jurisdiction.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT CORRECTLY FOUND THAT RNUR HAD SUFFICIENT CONTACTS WITH THE STATE OF GEORGIA TO SUPPORT THE EXERCISE OF DIVERSITY JURISDICTION BY THE FEDERAL DISTRICT COURT.

A. THE ELEVENTH CIRCUIT's RULING WAS PROPERLY FOUNDED ON RNUR's CONTACTS WITH THE STATE OF GEORGIA

The placement of a product into the stream of commerce, without more, is not an act of the defendant

purposefully directed toward the forum state sufficient for a finding of minimum contacts; additional conduct of the Defendant may indicate an intent or purpose to serve the market in the forum state, for example, designing the product for the market in the forum state, advertising in the forum state, establishing channels for providing regular advice to customers in the forum state, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum state. *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1987). The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation and intent that they will be used by consumers in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980). So long as a commercial actor's efforts are purposefully directed toward residents of the forum state, this Court has consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S.Ct. 2174, 2184, 85 L.Ed.2d 528 (1985).

RNUR and Ms. Vermeulen are not in dispute that these principles of law control the outcome of this case. The difference between their positions is actually very simple: RNUR insists that purposeful contact may not be found unless there is a finding of specific and exclusive contact with the forum state. Thus, RNUR complains that the Eleventh Circuit's finding that RNUR vehicles were

advertised everywhere in the United States is not a specific advertisement designed for Georgia alone. Petition for Certiorari, p. 8. Similar distinctions are made concerning other findings by the Court of Appeals regarding RNUR's contacts with all states, including Georgia. Petition for Certiorari, pp. 7-10.

This concentration on specific contacts, rather than intentional contacts, is disingenuous. Ms. Vermeulen is not required to tick off boxes on some mechanical list of contacts in order to have her claim against RNUR heard. Rather the question is whether RNUR purposely availed itself of the privilege of conducting business in Georgia such that it could reasonably anticipate being haled into court there. 975 F.2d at 757. Ms. Vermeulen is not required to negate every theory except that contacts were with Georgia; only a prima facie case is required. *Morris v. SSE, Inc.*, 843 F.2d 489, 492 (11th Cir. 1988). All favorable inferences are required to be drawn in her favor. *Id.*

RNUR does not seriously dispute that the LeCar was designed to be marketable in every state. Nor is there any dispute that the LeCar was advertised in a nationwide campaign. The establishment of a nationwide system of Renault dealers is undisputed, as is the presence of six Renault dealers in Georgia. It is undisputed that, by contract, AMSC was the sales agent for RNUR and that the sales territory included all fifty states. Obviously, Georgia is included in the ambit of all of these purposeful activities. RNUR contends that due process will not permit the consideration of these activities because they are not directed specifically and exclusively toward Georgia. Unsurprisingly, no authority for this proposition is cited.

Rather, there is nothing unusual in considering purposeful contacts with all states to include the forum state. *See Poyner v. Erma Werke GMBH*, 618 F.2d 1186 (6th Cir. 1980), *cert. denied*, 449 U.S. 841, 101 S.Ct. 121, 66 L.Ed.2d 49 (1980)

The underlying rationale of the decision by the Court of Appeals in this case is entirely logical. If RNUR wishes to avoid jurisdiction in the face of this evidence, then it bears the responsibility of providing evidence that Georgia was *not* included within these purposeful activities. Absent such evidence, a prima facie case is presented and jurisdiction may be exercised. On this record, no basis for certiorari is presented. The petition should be denied.

B. LAURA ANN VERMEULEN's CAUSE OF ACTION IS SUFFICIENTLY RELATED TO RNUR's CONTACTS WITH GEORGIA TO SUPPORT THE EXERCISE OF JURISDICTION.

In order for the exercise of jurisdiction to comport with due process, the cause of action must relate to or arise out of a defendant's contacts with the forum. *Helicopteros Nacionales de Columbia v. Hall*, 466 U.S. 408, 414-417, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984). The focus of the inquiry is into the relationship between the defendant, the forum, and the litigation. *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977). Obviously, the individual acts of the plaintiff cannot by themselves give rise to jurisdiction and are not the focus of the inquiry. *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).

Relying on this authority, RNUR seeks to make the sole focus of the jurisdictional inquiry Laura Ann Vermeulen's moving to Georgia with a vehicle purchased elsewhere. RNUR's reformulation of the rule is that there may be no exercise of jurisdiction, regardless of the defendant's contacts with the forum, unless the particular product was purchased by the plaintiff in the forum state. None of this Court's holdings on the issue of jurisdiction support such a rule.

Ms. Vermeulen's cause of action is based upon an allegation that her Renault LeCar contained a design defect, one that is common to all similar vehicles. That this particular LeCar restraint system injured Ms. Vermeulen is a matter of fortuity; she could as easily have purchased a used Renault in Georgia from one of the authorized Renault dealers. It is precisely to avoid the effect of such random events that the due process limits on personal jurisdiction were designed to provide a degree of reasonableness and predictability.

RNUR created a market for its products in all fifty states, including Georgia. It intentionally created the structure through which it could service the market in Georgia. The owner's manual in Ms. Vermeulen's LeCar invited her to use the services of Renault dealers in Georgia. On these facts, it cannot reasonably be contended that RNUR could not anticipate being haled into court in Georgia to defend against a claim of defect. Indeed, its agreements with AMSC, by asserting a right to take over the defense of lawsuits, affirmatively disclose

RNUR's recognition that its activities could result in lawsuits over design defects.[1]

RNUR's own affirmative acts created a system whereby its automobiles would be used in Georgia. This included both automobiles originally sold here and those that were brought here because of or in reliance upon RNUR's service of the market in Georgia. It is to this system created by RNUR that the cause of action is related. That relation is sufficient to support the exercise of jurisdiction.

II. RNUR's LATE ASSERTION OF THE DEFENSE OF FOREIGN SOVEREIGN IMMUNITY DOES NOT DEPRIVE THE FEDERAL DISTRICT COURT OF JURISDICTION.

A. BY FAILING TO RAISE THE DEFENSE IN THE TRIAL COURT, RNUR WAIVED ANY ENTITLEMENT TO TREATMENT AS A FOREIGN SOVEREIGN.

Although immunity under the Foreign Sovereign Immunities Act is a bar to subject matter jurisdiction, it is unique among issues of subject matter jurisdiction in that it may be waived by the foreign state, either explicitly or implicitly. 28 U.S.C. § 1605(a)(1). An affirmative defense

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[1] The fact that RNUR reserved the right to take over lawsuit defense is not a contact with the state of Georgia upon which jurisdiction can depend. However, it is difficult to conceive of any greater indication of the reasonableness, in due process terms, of a defendant anticipating being haled into court than its own specific acknowledgment that its activities, carried out in every state, could give rise to design defect lawsuits.

not raised in the trial court, and raised for the first time on appeal, is generally considered waived. *E.g. Golden Oil Co., Inc. v. Exxon Co., U.S.A.*, 543 F.2d 548 (5th Cir. 1976). Since sovereign immunity is an affirmative defense, it is waived by failure to plead in the answer. *Canadian Overseas Ores, Ltd. v. Compania De Acero Del Pacifico S.A.*, 727 F.2d 274, 277 (2d Cir. 1984). *See also U.S. v. Crawford Enterprises, Inc.*, 643 F.Supp. 370 (S.D.Tx. 1986); *Barragan v. Banco BCH*, 188 Cal.App.3d 283, 232 Cal.Rptr. 758 (Cal. 1987); *Aboujdid v. Singapore Airlines, Ltd.*, 67 N.Y.2d 450, 503 N.Y.S.2d 555, 494 N.E.2d 1055 (N.Y. 1986). Other litigation situations in which a response of immunity should reasonably be expected may also result in waiver. *Crawford Enterprises, supra.*

RNUR's Answer, filed more than three years ago, does not raise the defense of sovereign immunity (R. 1-8). Three years of litigation have revolved precisely around the issue of the nature of RNUR's business and its involvement with the United States. Litigation of those issues did not result in the raising of a sovereign immunity defense. The defense was never asserted until after RNUR had lost its petition for rehearing or en banc consideration before the Eleventh Circuit.

The permission of sovereign immunity in U.S. courts is a matter of comity and forbearance rather than a constitutional imperative. *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). The party seeking such immunity is required to raise the issue in a timely manner – in its answer. When the defense has not been raised after three years of litigation, it is waived.

The reason that a party raising the defense of foreign sovereign immunity is required to do so in a timely manner or be held to have waived the defense is that resolution of entitlement to the defense is a question of fact. Proper evidence, tested by the adversary process, is required to support foreign sovereign immunity. *See, e.g., Sesostris, S.A.E. v. Transportes Navales, S.A.*, 727 F.Supp. 737 (D.Mass. 1989); *Outboard Maritime Corp. v. P.T. Indonesian Consortium of Construction Industries*, 575 F.Supp. 1222 (S.D.N.Y. 1983).

Clearly, RNUR has submitted evidence in the trial court in this case that it was owned by the French government. 975 F.2d 746, 748. Absent the defense of foreign sovereign immunity which was never asserted, however, that fact is immaterial. Whether RNUR was owned by the French government or a private French citizen is simply not relevant to whether its contacts with the state of Georgia were sufficient to support diversity jurisdiction under 28 U.S.C. § 1332, which is the only issue which was raised in the trial court. Laura Ann Vermeulen therefore had no reason to investigate or challenge RNUR's assertion of state ownership, or to determine whether there was an express waiver of sovereign immunity by the French government, or investigate any of the myriad factual issues involved in the defense of foreign sovereign immunity.[2]

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[2] Inexplicably, after denying RNUR's Motion to Vacate, which was based upon the late assertion of the foreign sovereign immunity defense, the Eleventh Circuit entered an order which accepted the defense as factually true. *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534. RNUR may now contend that this order is the law of the case, precluding Ms. Vermeulen from

It was RNUR's responsibility to properly present the issue of foreign sovereign immunity to the trial court and by extension to the Eleventh Circuit. It was RNUR's waiver of the defense, by failure to properly and timely present it, that resulted in this case being decided without reference to the Foreign Sovereign Immunities Act. RNUR should not now be heard to complain of the inevitable result of its own failure to plead and argue an affirmative defense. The petition for certiorari should not be granted on this ground.

B. WHETHER IT WAS A FOREIGN SOVEREIGN OR A PRIVATE CITIZEN, RNUR HAD SUFFICIENT CONTACTS WITH GEORGIA TO SUPPORT THE EXERCISE OF JURISDICTION.

RNUR has not cited a single case, or indeed any other authority, which stands for the proposition that the due process test for jurisdiction would be stricter if personal jurisdiction is based on the provisions of 28 U.S.C. § 1330(b) than if based on 28 U.S.C. § 1332. Put another way, RNUR's Foreign Sovereign Immunities Act defense affects the Eleventh Circuit's finding of personal jurisdiction if and only if contacts found sufficient to satisfy the Due Process clause of the Fourteenth Amendment may

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litigating the factual basis of the foreign sovereign immunity defense; in other words RNUR gains a strategic advantage from its failure to properly plead and present its defense. If summary exercise of this Court's supervisory powers is called for, Supreme Court Rule 16.1, it would be for the purpose of ensuring that the case is remanded so that proper consideration of waiver and the factual basis of the immunity defense may be considered.

nonetheless be insufficient to satisfy the Due Process clause of the Fifth Amendment. The cases, including those cited by RNUR, support precisely the contrary conclusion: the minimum contacts test for analyzing personal jurisdiction is the same under either due process clause. *E.g. Republic of Argentina v. Weltover, Inc.*, ___ U.S. ___, 112 S.Ct. 2160, 2169, 119 L.Ed.2d 394 (1992) ("direct effect" element of 28 U.S.C. § 1605(a)(2) might be construed as embodying minimum contacts test); *Waukesha Engine Div., Dresser Americas, Inc. v. Banco Nacional de Fomento Cooperativo*, 485 F.Supp. 490, 492 (E.D.Wis. 1980) (legislative history shows incorporation of minimum contacts test in FSIA); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) (applying minimum contacts due process analysis to FSIA).

This is precisely the conclusion reached in this case by the Eleventh Circuit in its most recent opinion.[3] 985 F.2d at 1545. Unsurprisingly, the Eleventh Circuit based its finding of personal jurisdiction under the FSIA on precisely those facts which had previously been found to support diversity jurisdiction under the Georgia long-arm statute. *Compare* 985 F.2d 1534, 1537-1541 *with* 975 F.2d 746, 747-753. RNUR does not seriously contend that, if the first decision is correct, the second would be incorrect.

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[3] As argued above, the Eleventh Circuit should not have addressed this issue.

It is not necessary to repeat here the facts which support the exercise of jurisdiction in the Northern District of Georgia. Those facts support diversity jurisdiction. They support jurisdiction under the FSIA. They do not support the grant of the petition for certiorari.

CONCLUSION

For the foregoing reasons, this case does not present a conflict between the Eleventh Circuit and other courts of appeals or any state court of last resort. The Eleventh Circuit has not so far departed from the usual course of proceedings as to call for the exercise of this Court's power of supervision.[4] No other issue of comparable

[4] Unless summarily done to vacate the decision of an issue not properly before the court. *See* n. 1, *supra* and text accompanying.

importance or necessity is presented by the petition for certiorari. It should be denied.

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